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1872

Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3 - **Divl.Ct. 32**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 31 (2) - - - - **C.A. 127**

1925

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Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 39 (1) - - - - **C.A. 9**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*) - - - **Divl.Ct. 187**

1931

Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *s.* 5 (*g*) (*h*) **Devlin J. 316**

1934

Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 **McNair J. 78**

—— —— *s.* 1 (1) (3) - - - **C.A. 300**

County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 89 (1) (3) (*as amended by Administration of Justice Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 31 (4)) **C.A. 371**

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National Insurance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 53 (1) - - **Divl.Ct. 353**

1947

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 23 (2) (4) **Divl.Ct. 41**

—— —— *ss.* 12 (1), 18, 23 **Lord Goddard C.J. 173**

—— —— *s.* 16 (3) - - **Donovan J. 286**

1949

Agricultural Marketing Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 38), *ss.* 5 (1) (*a*), 8 **Devlin J. 316**

1950

Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 4, 5 - - - - - - **C.A. 1**

—— —— *s.* 22 - - - **Devlin J. 316**

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County Court Rules, 1936 (*as amended*), *Ord.* 47 - - - - - - **C.A. 9**

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R.S.C., *Ord.* 34, *rr.* 1, 7 - - - **C.A. 254**

Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (*S.I.* 1950, *No.* 728), *reg.* 5 (1), (2), (9) (*a*) **Donovan J. 286**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

In re PHOENIX TIMBER CO. LTD.'S APPLICATION.

C. A.

1958
March 7.

Lord Evershed M.R., Parker and Sellers L.JJ.

[1957 R. No. 1543.]

Interpleader—Submission of issue to arbitration—Discretion of court to refer to arbitration—Principles of exercise—Charterparty—Arbitration clause—Issue between owners and charterers—Master's order referring issue to commercial court—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 4, 5.

A time charter of a ship provided that the owners were to have a lien on all cargoes and sub-freights belonging to the charterers for claims under it, and that all disputes arising under it should be referred to arbitration in London. The ship carried a cargo of timber from Archangel to London. The freight amounted to some £13,000 and the owners claimed about £10,000 of that sum from the consignees of the cargo in purported exercise of their lien in respect of unpaid hire. The charterers disputed their claim. The consignees of the cargo interpleaded and paid the sum in dispute into court. The master made an order directing that the dispute between the owners and the charterers should be tried by the commercial court. The charterers appealed:—

Held, (1) that the discretion conferred on the court by section 5 of the Arbitration Act, 1950,[1] to direct that an interpleader issue shall be determined in accordance with an arbitration agreement was not an unlimited discretion to say whether the issue should be determined in accordance with the arbitration agreement or not, but that the discretion conferred by section 5 was to be exercised on similar principles to those applicable to the discretion conferred by section 4.

(2) That although the issues which had arisen might be of a nature which were particularly appropriate to be tried by the commercial court, that was not a sufficient ground for refusing to give effect to the parties' agreement to be bound by arbitration and, accordingly, the issue must be referred to arbitration.

Heyman v. *Darwins Ltd.* [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337 applied.

APPEAL from Master Lawrence.

The respondents, the Compania Isla de Oro Limitada, of St. Jose, Costa Rica, were the owners of the steamship *Ange*. The appellants, V/O Sovfracht, were the charterers of the vessel under a time charter which provided, inter alia, that the owners were to have a lien upon all cargoes and sub-freights under the charter and, further, that all disputes arising under the charter-party should be referred to arbitration in London. The applicants, the Phoenix Timber Co. Ltd., were the owners of timber imported from the U.S.S.R. on the S.S. *Ange* which was discharged in London. £12,879 10s. 2d. was due from them for freight in respect of this shipment. The owners claimed a lien on that sum in respect of unpaid hire. The charterers objected to any part of the freight being paid to the owners, contending that they had themselves valid claims against the owners for breach of warranties under the charter. The applicants took out an interpleader summons under which they paid £10,538 into court.

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[1] Arbitration Act, 1950, s. 4: "(1) If any party to an arbitration "agreement, . . . commences any "legal proceedings in any court "against any other party to the "agreement, . . . in respect of any "matter agreed to be referred, any "party to those legal proceedings may "at any time after appearance, and "before delivering any pleadings or "taking any other steps in the pro-"ceedings, apply to that court to stay "the proceedings, and that court or "a judge thereof, if satisfied that "there is no sufficient reason why the "matter should not be referred in "accordance with the agreement, and "that the applicant was, at the time "when the proceedings were com-"menced, and still remains, ready "and willing to do all things neces-"sary to the proper conduct of the "arbitration, may make an order "staying the proceedings. . . ."

S. 5: "Where relief by way of "interpleader is granted and it "appears to the High Court that the "claims in question are matters to "which an arbitration agreement, to "which the claimants are parties, "applies, the High Court may direct "the issue between the claimants to "be determined in accordance with "the agreement."

The matter came before the master and he (inter alia) ordered that the issue as to the entitlement to the sum of £10,538 as between the owners and the charterers should be tried by the commercial court.

The charterers appealed on the grounds that the issue fell within the arbitration clause in the charterparty, that it was a dispute eminently suited to be tried by a commercial tribunal pursuant to that clause, that the agreement should be adhered to and further, that the master exercised his discretion wrongly in refusing to order the issue to be tried by arbitration.

The facts are more fully stated in the judgment of Lord Evershed M.R.

R. A. MacCrindle for the charterers, the appellants. The court is asked to vary the master's order and to direct that the issue between the parties be tried by arbitration. The principle laid down by the House of Lords in *Heyman* v. *Darwins Ltd.*[2] in connexion with the discretion conferred by section 4 of the Arbitration Act, 1950, should be applied here. All disputes under the time charter are in terms covered by the arbitration clause in it. This dispute is most suitable to be tried by an arbitrator. The fact that there is a fund in court is not exceptional and of itself should not affect the parties' rights under the charter. The discretion conferred by section 5 of the Arbitration Act, 1950, should be exercised subject to the same limitations as the discretion conferred by section 4.

Basil Eckersley for the shipowners, the respondents. Section 5 gives to the court a general discretion. The question at issue here does not arise out of an application to the court by one of the parties. That case is provided for by section 4. The fetters imposed by that section on the discretion of the court are not to be found in section 5. The master has power conferred on him by section 5 on his own initiative to direct that a matter shall go to arbitration. The phrase "may direct" in that section confers on him a general discretion. He is entitled to take all relevant matters into consideration. The court should not interfere with the way in which he has exercised his discretion. There were good grounds for his exercising his discretion as he did: (1) There is a fund in court here; (2) the matter will be more speedily dealt with by the commercial court than if it is referred to arbitration; (3) arbitration is the more expensive procedure. Further, it is submitted that the appellants by appearing before the master took a step in the action and cannot now ask to have the matter referred to arbitration.

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[2] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

R. A. MacCrindle in reply. From the outset before the master the charterers stated that they were insisting on their rights under the arbitration clause.

[He was stopped.]

LORD EVERSHED M.R. This is an appeal against an order made by the master on January 30 upon an application by way of originating summons on the part of a company, Phoenix Timber Co. Ltd., who had paid money into court.

The circumstances, quite briefly, were that the applicants, the Phoenix Timber Co. Ltd., were the consignees or receivers of a cargo of timber, which had been carried in the S.S. *Ange* from Archangel to London. The steamer was and is owned by the respondents before this court, Compania Isla de Oro Limitada, of Costa Rica, and she was voyaging under the terms of a time charter, the charterers being the appellants in this court, V/O Sovfracht, of Moscow. The actual voyage was the subject of a sub-time charter, a transaction permitted by the original charter; but for present purposes no significance attaches to that circumstance. The bills of lading had been made out on behalf of the charterers, and the sum for freight, prima facie, was, therefore, upon the discharge of the goods and delivery of the bills of lading, payable to the charterers.

Clause 17 in the time charter provides as follows: "Owners "to have a lien upon all cargoes and sub-freights belonging to the "time charterers for all claims under this charter." A number of disputes had arisen between the owners and the charterers. It was said, for example, that the steamer had not the capacity which, according to clause 28 of the charter, she was stated to have had. There was again a dispute about bunkering and the like. The result had been a refusal on the part of the charterers to pay sums which otherwise would have been due to the owners for hire.

Thus it came about that when the consignees of the timber proceeded to pay what they owed for freight, amounting to some £13,000, the owners claimed a lien on that sum for £9,000 or perhaps £10,000 in respect of unpaid hire. The actual sum has since been reduced by a payment out to £6,000 or £6,500, but to that extent it is not now in doubt that there is a series of issues between owners and charterers which arise under the terms of the contract of charter—that is to say, whether there is a valid claim by the charterers against the owners for breach of warranties or other terms of the charter, on the one side, and, on the other, a claim for unpaid hire.

The charter contains an arbitration provision in these terms: "Any dispute arising under this charterparty shall be referred to "arbitration in London. One arbitrator to be nominated by the "owners and the other by the charterers," with provisions in ordinary form for appointment of an umpire. The disputes between the owners and the charterers are admittedly disputes arising under the charterparty.

When the matter was before the master it was upon the application of the consignees, but, in the ordinary course, he called upon the two contestants to say, aye or no, whether they claimed this money. So far as the owners are concerned, as Mr. Eckersley informed us, their answer to that question was: Yes, they did, subject to the claim which they did not attempt to deny or conceal that, as to some part of it, there was an issue, the solution of which would or might seriously affect the quantum which the owners could recover by way of the alleged lien. Equally, on the part of the charterers an affirmative answer was given to the question: did they lay claim to this money? But Mr. MacCrindle has made it clear that, since this was an interpleader proceeding on the initiative of a third party, he was conscious that he must not prejudice the position which he desired to take under the charterparty (namely, that this claim was subject to the arbitration clause) by doing something which might otherwise be regarded as equivalent to taking a step in the action, and he informed us, therefore, that though he did put the point that he claimed the sum, and, indeed, alleged that the lien was not one which could be asserted against him, he submitted that the issue which arose was one within the arbitration clause and which should accordingly be referred by the parties to arbitration.

We were told that the hearing before the master took half an hour, and that by far the greater part of that time was spent in looking into the terms of the contract and seeing how the dispute arose, and so on, and that the question whether this matter should go to arbitration or be referred to the arbitrament of the commercial court was dealt with somewhat briefly at the end. As Sellers L.J. pointed out, on the face of it this dispute is of a kind eminently suited for trial in the commercial court, and the advantages of despatch and economy of procedure as well as costs in that court may perhaps not always be sufficiently appreciated. It remains the fact that these parties, when they made their bargain, included as part of it the arbitration clause.

The question, therefore, is, in brief, should they now be held to that part of the bargain or should this matter be determined by the court notwithstanding the bargain? The question is dealt with expressly by section 5 of the Arbitration Act, 1950: "Where "relief by way of interpleader is granted and it appears to the "High Court that the claims in question are matters to which "an arbitration agreement, to which the claimants are parties, "applies, the High Court may direct the issue between the "claimants to be determined in accordance with the agreement." On the face of it that would appear to give an unlimited discretion to the High Court to say whether, in all the circumstances of the case, the issue should be determined in accordance with the arbitration clause or not. Although that section re-enacts the section in the Act of 1934, there appears to be no authority which serves as a guide to the meaning of the discretion in that section. But a somewhat similar discretion is enshrined in the preceding section 4 (1) which provides: "If any party to an arbitration "agreement, or any person claiming through or under him, com-"mences any legal proceedings in any court against any other "party to the agreement, or any person claiming through or "under him, in respect of any matter agreed to be referred," then any party before taking any steps may apply to stay and the court or judge "if satisfied that there is no sufficient reason why "the matter should not be referred in accordance with the agree-"ment, and that the applicant was, at the time when the "proceedings were commenced, and still remains, ready and "willing to do all things necessary to the proper conduct of the "arbitration, may make an order staying the proceedings."

There, again, the power of the court is expressed as a discretion, but as regards that discretion there is the highest authority as to its significance. We have been referred by Mr. MacCrindle to *Heyman* v. *Darwins Ltd.*[1] There the question arose under the corresponding section of the Act of 1889 and there is admittedly no relevant difference in language between that section and the present. In that case Cassels J. at first instance had thought that the issues which had arisen between the parties were of a nature which made it particularly appropriate and economically beneficial that the matter should be tried in the commercial court. Lord Wright said this[2]: "The judge in this

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[1] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[2] [1942] A.C. 356, 388.

"case, like the master, has carefully set out his reasons in "writing. His view in effect is that the broad issue is a question "of law, apparently not so much on the construction of the con- "tract as on that of the correspondence, whether in law or in fact "or in both there has been a repudiation. In my opinion, these "reasons are not sufficient to justify [not] [3] staying the action"; and Lord Porter in his speech and the other noble Lords gave similar reasons for the view which the House took.

It must, therefore, be taken that in a case under section 4 the mere fact that the dispute is of a nature eminently suitable for trial in court is not a sufficient ground for refusing to give effect to what the parties have by contract agreed. It is quite true, as Mr. Eckersley observed, that in section 4 some guide to a conclusion is given by the parliamentary language; for the section speaks of the court being "satisfied that there is no sufficient "reason why the matter should not be referred in accordance "with the agreement," words which are not repeated in section 5. But the absence of any repetition in section 5 does not persuade me that the discretion in section 5 is to be exercised for some different, still less some opposite, reason. In my judgment the discretion in section 5 is to be exercised on similar grounds as the discretion in section 4. After all, section 5 is only dealing with a different procedural occasion in which an issue arises which has been previously the subject of an arbitration contract. There seems to be no ground of principle why there should be a different basis for deciding that question in the one case from that to be applied in the other. I, therefore, think that the principles which were laid down in *Heyman* v. *Darwins Ltd.*[4] for application under section 4 ought also to be applied in a case, such as this, under section 5.

In those circumstances I think, with all respect to him, that the master erred in directing, as he did, that this issue should be tried in the commercial court and should not be referred to arbitration. In fairness to him, I think that it is plain from what has been said that this matter was rather left as a kind of postscript to the main part of the argument, and I have no doubt therefore, that his attention was not fully directed to the matter as ours has been in this court. Had it been so directed, it is highly probable that he would have taken the view that, however suitable for trial in the commercial court, still the bargain should be adhered to. I am also satisfied that nothing that the parties here did before the master in any way forfeits or qualifies their right now to ask that effect should be given to the contract.

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[3] The context appears plainly to require a "not" here, though it did not appear in the official version of Lord Wright's speech, revised by him, nor in the report in the Law Reports, revised by him. EDITOR.

[4] [1942] A.C. 356, 388.

In those circumstances, I have come to the conclusion that this order should be, so far as necessary, varied so as to direct that the issue between the two parties be referred in accordance with their contract to the arbitration provided by the time charter.

PARKER L.J. I agree, and I would only add this. I think it is plain that if the owners in this case had started proceedings in the High Court to re-claim the sum now in dispute, and the time charterers had applied for a stay, it would have been granted. The owners, on whom the onus would rest to show there were good reasons why the court should deal with it rather than the tribunal agreed upon between the parties, would be completely unable to put up any good ground for opposing the stay. In those circumstances, it does seem to me surprising if, as is suggested, different principles apply when, instead of the owners taking proceedings, the issue is started in interpleader proceedings. It seems to me it cannot in principle matter how the question whether there is to be arbitration or not comes before the court.

Mr. Eckersley has stressed the different wording in section 5 of the Arbitration Act, 1950, as compared with section 4, and it is suggested that section 5 gives the master a much wider discretion. It seems to me, however, following as it does directly after section 4, that the same principles apply, and, indeed, I take it to be the law that where this court has power to interfere with what parties have agreed, they will not do so except for good reasons shown. Lord Porter said in *Heyman* v. *Darwins Ltd.*,[5] to which my Lord has referred, in connexion with an application under section 4[6]: "The parties have chosen to refer their "differences to arbitration, and to arbitration they should go in "the ordinary course unless there is some good reason to the "contrary."

Accordingly, I feel in this case that there was no evidence on which the master could exercise his discretion in the way he did and I would allow the appeal.

SELLERS L.J. I agree, reluctantly but without doubt. Reluctantly because I think the master was right when he said

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[5] [1942] A.C. 356.

[6] Ibid. 391.

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PHOENIX TIMBER CO. LTD.'S APPLICATION, *In re.*

this was a very proper and suitable case to try before the commercial court, but without doubt because I can see no ground to justify a refusal to stay the action or in effect to make the order that the parties should not be bound by their agreement to arbitrate.

I agree with my Lords in their interpretation of section 5 of the Act.

Appeal allowed.

Solicitors: *Middleton, Lewis & Co.; Constant & Constant.*

B. A. B.

HANAK *v.* GREEN.

C. A.
1957
Nov. 18, 20, 21.
1958
March 21; *April* 1.

Hodson, Morris and Sellers L.JJ.

Practice — Set-off — Equitable set-off — Building contract — Action for failure to complete works—Claim to set-off on quantum meruit for extra work—Trespass to tools—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 39 (1)—*R.S.C., Ord.* 19, *r.* 3.

Costs — County court action—Set-off — Counterclaim or set-off — Claim extinguished by set-off—Judgment for defendant on claim and for balance of counterclaim—Appropriate order for costs—County Court Rules, 1936 (*as amended*), *Ord.* 47.

Under a building contract the plaintiff, a widow, sued the defendant builder in the county court for £266 for breach of contract for failing to complete or properly complete certain items of work. The defendant counterclaimed or claimed by way of set-off (1) on a quantum meruit in respect of extra work done outside the contract, (2) on the ground that loss was caused by the plaintiff's refusal to admit the defendant's workman, and (3) for trespass to the defendant's tools. The county court judge, revising the report of a referee to whom the respective claims had first been submitted, awarded the plaintiff £74 17s. 6d., and the defendant £84 19s. 3d. (£69 11s., £12 7s. 6d., and £3 0s. 9d. on each of the three grounds respectively), and ordered the plaintiff to pay the balance of £10 1s. 9d. to the defendant. He further gave the plaintiff the costs on her claim on scale 3[1] and the defendant his costs on the counterclaim, also on scale 3, and directed that the parties should share equally the costs of the reference.

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[1] County Court Rules, 1936 (as amended), Ord. 47, r. 1: "Subject to "the provisions of any Act or Rule, "the costs of proceedings in a county "court shall be in the discretion of "the court. . . ."

R. 5. "(2) The Scale of Costs "applicable to a sum of money only "shall be as follows:

Sum of Money.	Scale applicable.
"Exceeding £2 and not exceeding £10 . .	Scale 1
"Exceeding £10 and not exceeding £30 . .	Scale 2
"Exceeding £30 and not exceeding £100 . .	Scale 3
"Exceeding £100 . .	Scale 4."

R. 6. "(1) Subject to Rules 7 . . . "of this Order, the Scale of Costs in

C. A.
1958

HANAK
v.
GREEN.

The defendant appealed, contending that his counterclaim should be treated as being a set-off and, therefore, the plaintiff should recover nothing, and he (the defendant) should recover £10 1s. 9d. and be awarded the costs of the proceedings:—

Held, (1) that since the passing of the Judicature Acts reliance might be placed in any court on any equitable set-off that formerly could only have been asserted in a court of equity; and that there might be (i) a set-off of mutual debts, (ii) in certain cases a setting up of matters of complaint which, if established, reduced or even extinguished the claim, and (iii) reliance on equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or protection.

(2) That a court of equity would have held that neither of the claims in the present case ought to be insisted upon without the other being taken into account, and that the defendant had an equitable set-off which defeated the plaintiff's claim; there would, therefore, be judgment for the defendant on the claim and judgment for him on the counterclaim for the balance of £10 1s. 9d.

(3) That on that basis the fair order to make as to costs was that there should be judgment for the defendant on the claim with costs on scale 4: that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs on scale 2: that the costs of the reference (which should be taxed on scale 3) should be dealt with as was directed by the judge, that is, that they be treated as referable as to one-half to the plaintiff and one-half to the defendant.

Dicta of Cleasby B. in *Young* v. *Kitchin* (1878) 3 Ex.D. 127, 130 and 131; Lord Esher in *Stumore* v. *Campbell & Co.* [1892] 1 Q.B. 314, 316; 8 T.L.R. 99, and of Lord Alverstone C.J. and Channell J. in *Bankes* v. *Jarvis* [1903] 1 K.B. 549, 552, 553; 19 T.L.R. 190; *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.* [1949] 1 K.B. 107; 64 T.L.R. 381; [1948] 2 All E.R. 196; and *Sharpe* v. *Haggith* (1912) 106 L.T. 13; 28 T.L.R. 194 applied.

Judgment of Judge Reid reversed.

APPEAL from Judge Reid, sitting at Kingston-on-Thames County Court.

The plaintiff, Mrs. Bozena Hanak, a widow, bought a house from the defendant, Sidney Arthur Green, a builder. The purchase was to be completed on July 31, 1954. The defendant agreed to do certain works to the house which were detailed in a specification. For this he was to receive £800 in addition to the

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"an action for the recovery of a sum "of money only shall be determined—(*a*) as regards the costs of "the plaintiff, by the amount recovered; and (*b*) as regards the "costs of the defendant, by the "amount claimed; . . ."

R. 7. "(1) Subject to the next "succeeding paragraph, Rule 6 of "this Order shall apply to a counterclaim as it applies to a claim."

R. 7 (2) contains detailed provisions relating to the position where plaintiff or defendant is awarded costs on both claim and counterclaim.

purchase price of the house. The works were to be finished by the date fixed for completion and the £800 was to be paid with the balance of the purchase money payable on completion. The works were not finished to time. The plaintiff ordered certain extra items of work. The plaintiff went into occupation of the house on August 11, 1954. The plaintiff said that most of the interior work was then finished but that a good deal of it had not been done satisfactorily: as to the exterior work, the plaintiff said that it was not at that date completed, and that some of the work that had been done was not satisfactory. The defendant, in a letter of August 31, agreed that some work remained to be completed. He complained of unreasonable behaviour on the part of the plaintiff in that she had refused to give the defendant's men entry to carry out repairs. Much correspondence took place in which mutual complaints were expressed. Both parties employed solicitors. In a letter of January 5, 1956, which contained detailed comments or replies as to the complaints that had been made concerning various items of work required by the specification, the defendant's solicitors wrote: "Your client still "owes our client certain moneys for extras, and taking into "account the additional expense to which they were put as a "result of your client's lack of co-operation, it seems to us that "to settle the matter your client should be allowed this money "to off-set any expense which she may incur to complete any "work which remains outstanding under the contract." No settlement was, however, effected.

Eventually the plaintiff commenced proceedings in the county court. By her particulars of claim dated December 7, 1956, she complained of failures to complete items of work or properly to complete them. The items of complaint were 37 in number, and the referable items of damage added up to £266 14s. In his pleading the defendant admitted that certain of the works were not completed in proper manner, and that "subject to the "counterclaim herein the plaintiff is entitled to recover in respect "of such matters as follows": there was then an enumeration of 10 items with referable amounts totalling £19 2s.

On the reference, which was to a chartered architect, it was held that the plaintiff was right as to 16 items, and in reference to these the amount allowed was £110 7s. 6d. When the matter came before the judge he disallowed one of the 16 items. That left 15 items totalling £74 17s. 6d.

In addition to dealing with the plaintiff's claim as referred to above, and saying that his admissions of liability were "subject "to the counterclaim therein," the defendant also pleaded (in paragraph 7) as follows: "The defendant will refer to his counterclaim in this action and will, if necessary, seek to set up the same by way of set-off in extinction or in the alternative in diminution of the plaintiff's claim." The counterclaim was threefold. First, a claim based on a quantum meruit for extra work ordered and done. There were four items and £95 15s. 10d. in total was claimed. The referee allowed the four items and fixed the figures to total £69 11s. Secondly, there was a claim that loss was caused because the plaintiff refused access to the defendant's workmen. Under this heading £18 2s. 2d. was claimed. The referee allowed £12 7s. 6d. Thirdly, there was a claim that the plaintiff had thrown away certain tools of the defendant's workmen. Damages in trespass were claimed in the sum of £3 0s. 9d. This was allowed by the referee.

To the counterclaim of the defendant the pleading of the plaintiff was as follows: "The plaintiff makes no admissions as to any of the facts and matters alleged in the counterclaim and puts the defendant to the proof thereof. If any sum is found due from the plaintiff to the defendant the plaintiff will give credit for the same against the sum due to her on her claim."

In the result, therefore, the plaintiff became entitled to £74 17s. 6d. because the defendant had done bad work or omitted to do certain work. The defendant became entitled to £69 11s. for doing work not originally ordered: the defendant further became entitled to the £12 7s. 6d. and to £3 0s. 9d. as damages for trespass. The total entitlement of the defendant was £84 19s. 3d. The plaintiff was given judgment for £74 17s. 6d. and the defendant was given judgment for £84 19s. 3d. An order was made that the plaintiff should pay to the registrar of the court the sum of £10 1s. 9d., being the balance in favour of the defendant after deducting the amount adjudged to the plaintiff.

When the question of costs came to be considered Mr. Campbell (for the defendant) urged that all the claims arose out of one transaction and should be set off. The judge gave the plaintiff her costs (on scale 3) on the claim, and gave the defendant his costs (on scale 3) on the counterclaim. The referee had stated in his report that the defendant failed to complete the work by the agreed time and did some of the contract work some few months after the agreed time. In deciding what order to make as to costs the judge was influenced by the fact that "the root cause of the trouble was the defendant's failure to do properly and on time the work he originally contracted to do."

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The judge thought "that justice would best be done" by the order he made and by setting off one total against the other. He thought that it would be fair to treat the costs of the reference as attributable as to one-half to each of the parties.

The defendant appealed, contending that the items of his counterclaim should have been treated as being in part a set-off and, therefore, he should have been awarded the whole costs of the action.

Alan Campbell for the defendant. The defendant is asking for all the costs of the action and is raising the question of the principle to be applied where all the facts are interwoven in one dispute and the defendant's counterclaim or set-off exceeds the amount of the plaintiff's claim. Should the defendant, as the trial judge has decided, bear a share of the costs? The material rules are R.S.C., Ord. 19, r. 3, and Ord. 23, r. 9, of the County Court Rules, 1935, and R.S.C., Ord. 65, r. 1. The main point for consideration is whether every set-off can be pleaded as a counterclaim, although every counterclaim may not be pleaded as a set-off. It is not necessary that a counterclaim should be connected with or of the same character as the plaintiff's claim: see Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 678. in which *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*,[2] on which the defendant relies, is mentioned. In *Chell Engineering Ltd.* v. *Unit Tool and Engineering Co. Ltd.*[3] no mention was made of *Morgan's* case and the set-off machinery was not availed of. County court judges now invariably follow what is known as the "one-way order," following the decision in *Chell's* case. The decision in *Childs* v. *Blacker*[4] supports the common-sense view and is relied on. Solicitors, however, are advising clients to make payments into court rather than adopt the legitimate procedure of set-off, which is consequently falling into disuse.

Even if each case is not a set-off, it is submitted that the present appeal should succeed because the issues are closely interwoven: *Wilson* v. *Walters*.[5] No distinction appears to be drawn between a legal set-off and an equitable set-off. If it is a liquidated sum, it can be treated as a liquidated set-off: Brett L.J. in *Baines* v. *Bromley*.[6] The legal set-off was created in 1745 by the Act of Geo. 2, c. 24, but until 1873 there was no power to hear a counterclaim—there had to be a separate action.

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[2] [1949] 1 K.B. 107.

[3] [1950] 1 All E.R. 378.

[4] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243.

[5] [1926] 1 K.B. 511.

[6] (1881) 6 Q.B.D. 691, 694.

[MORRIS L.J. Do *Young* v. *Kitchin*[7] and *Chell's* case[8] conflict?]

I do not know, because I do not know what Singleton L.J. meant when he said "No set-off arises." *Chell's* case[8] should be distinguished by reason of *Morgan's* case,[9] and this court is invited to say that *Chell's* case was decided per incuriam.

The Judicature Act of 1873 made no difference to the position, because both legal and equitable set-offs existed already. An equitable set-off is any type of circumstances in which the old Courts of Equity would have granted an injunction. Of course there must be some form of connexion between the claim and the injunction. In the present case, on the authority of *Young* v. *Kitchin*[10] and *Allen* v. *Cameron*,[11] it would have been possible in the old Courts of Equity to apply for an injunction. In *In re A Bankruptcy Notice*[12] Lord Hanworth M.R. said there was no warrant in any authority for saying that there was some limit in the meaning of equitable set-off, and that the Court of Equity was not limited by precise rules. That would explain the observations of Channell J. in *Bankes* v. *Jarvis*.[13] The "half-way" system is gradually killing the set-off defence and leaving only the payment-in defence. It would be manifestly unjust in the present case and should not be allowed to stand. The defendant has succeeded in his set-off and should be allowed the general costs of the action.

Conrad Dehn for the plaintiff. Apart from the dictum in *Lund* v. *Campbell*[14] it is not the rule that the party who recovers the greater amount gets the whole of the costs. Where the plaintiff recovers more than the defendant, the plaintiff gets the costs of his claim and the defendant gets the costs of his counterclaim. Order 65, r. 1, of R.S.C. provides that costs are in the discretion of the court. The set-off here is not a legal set-off and the Judicature Act, 1873, does not affect the rights of a set-off. The counterclaim of the defendant cannot be called a set-off in equity. If it is a set-off in equity, that should not affect the order for costs. If it does affect the order for costs the plaintiff should still get the costs of the claim on which she succeeds. The judge has his discretion and is entitled to give the plaintiff her costs. It is the usual and proper course and there is nothing in the notice of appeal which covers the case put forward by the

[7] (1878) 3 Ex.D. 127.
[8] [1950] 1 All E.R. 378.
[9] [1949] 1 K.B. 107.
[10] (1878) 3 Ex.D. 127.
[11] (1833) 1 Cr. & M. 832.
[12] [1934] Ch. 431.
[13] [1903] 1 K.B. 549, 553.
[14] (1885) 14 Q.B.D. 821.

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defendant. The plaintiff's claim is for damages for breach of contract, and the sum which it is hoped to recover is specified. It is for an unliquidated sum. The defendant claimed damages for trespass and a quantum meruit for work done outside the contract. A quantum meruit is for a liquidated sum. The plaintiff's claim is for unliquidated damages, and for there to be a legal set-off each party must claim a liquidated sum. [*Knight* v. *Abbott, Page & Co.*,[15] *Stooke* v. *Taylor*[16] and *Bright* v. *Rogers*[17] were referred to.] A party who has an equitable right cannot set it off against an unliquidated claim: *McCreagh* v. *Judd.*[18] The Divisional Court was distinguishing *Bankes* v. *Jarvis.*[19]

The Judicature Acts have not affected the right of set-off. It is quite clear that a set-off was pleaded in *Chell's* case,[20] and the observation of Singleton L.J. meant that he thought a set-off had not been pleaded. On the authorities it is submitted that the trial judge exercised his discretion reasonably. *Christie* v. *Platt*[21] was not cited in *Childs* v. *Blacker.*[22] If it had been, the decision might have been different.

Campbell, in reply, submitted that the concluding reference to *McCreagh* v. *Judd*[23] and *Bankes* v. *Jarvis*[24] in the second paragraph to " Set-off " in the White Book, at p. 442, was inaccurate. Moreover, the note makes no reference to *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*[25]

[The following cases were also cited in argument: *Noel* v. *Davis*[26]; *Gray* v. *Webb*[27]; *Medway Oil and Storage Co. Ltd.* v. *Continental Contractors Ltd.*[28]; *Shrapnel* v. *Laing*[29]; *Cinema Press Ltd.* v. *Pictures and Pleasures Ltd.*[30]; *Hart* v. *Rogers*[31]; *In re Brown*[32]; *Best* v. *Hill*[33]; *Freeman* v. *Lomas*[34]; *Green* v. *Farmer*[35]; *Donald Campbell & Co. Ltd.* v. *Pollak*[36]; *Nicholson* v. *Little.*[37]]

Cur. adv. vult.

[15] (1882) 10 Q.B.D. 11.
[16] (1880) 5 Q.B.D. 569, 575.
[17] [1917] 1 K.B. 917.
[18] [1923] W.N. 174.
[19] [1903] 1 K.B. 549.
[20] [1950] 1 All E.R. 378.
[21] [1921] 2 K.B. 17.
[22] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243.
[23] [1923] W.N. 174.
[24] [1903] 1 K.B. 549.
[25] [1949] 1 K.B. 107.
[26] (1838) 4 M. & W. 136.
[27] (1882) 21 Ch.D. 802.
[28] [1929] A.C. 88; 45 T.L.R. 20.
[29] (1888) 20 Q.B.D. 334; 4 T.L.R. 241.
[30] [1945] K.B. 356; 61 T.L.R. 282; [1945] 1 All E.R. 440.
[31] [1916] 1 K.B. 646; 32 T.L.R. 150.
[32] (1883) 23 Ch.D. 377.
[33] (1872) L.R. 8 C.P. 10.
[34] (1851) 9 Hare 109.
[35] (1768) 4 Burr. 2214.
[36] [1927] A.C. 732.
[37] [1956] 2 All E.R. 699.

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April 1, 1958. The following judgments were read.

HODSON L.J. I have had an opportunity of seeing the judgment which Morris L.J. is about to read, with which I fully concur. In those circumstances, I do not propose to deliver a judgment of my own.

MORRIS L.J. The disputes between the plaintiff and the defendant were decided by the judge after considering the report made by a referee before whom the parties appeared for three days. So far as conclusions of fact and conclusions as to amounts are concerned there is no appeal. The appeal originates in the discontent of the defendant as to the orders as to costs. But in order to meet the difficulties that face those who complain of orders concerning costs when there is a discretion in a judge as to the award of them, the defendant challenges the form in which the judgment was entered. If he does this successfully then he submits that on a different form of judgment he can ask for a different order as to costs. It is only because of a very natural concern as to the costs of the struggle that submissions have been made to us as to the form in which the decisions in the struggle, not themselves now in issue, should be expressed. So it has come about that we have heard a learned debate, rich in academic interest, but, save so far as costs are affected, barren of practical consequence, on the subject as to whether certain claims could be proudly marshalled as set-off or could only be modestly deployed as counterclaim.

Before recording a view on the points of law it is necessary to have in mind the nature of the various claims. [His Lordship stated the facts and continued:] The judge did not, in his judgment, deal with the question as to whether there was a set-off: this was probably because the submission as to set-off was only being made in furtherance of the endeavour to have an order as to costs which was favourable to the defendant.

Mr. Campbell submits that the items which total £84 19s. 3d. should have been treated as being in part set off, with the result that the plaintiff should have been adjudged to recover nothing and the defendant to recover £10 1s. 9d. on his counterclaim.

In *In re A Bankruptcy Notice* [1] Lord Hanworth M.R. said: "With regard to the word 'set-off,' that is a word well known "and established in its meaning; it is something which provides "a defence because the nature and quality of the sum so relied

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[1] [1934] Ch. 431, 437.

"upon are such that it is a sum which is proper to be dealt with "as diminishing the claim which is made, and against which the "sum so demanded can be set off." But in an action at law a defendant could only set off after the passing of the Statutes of Set-off. The statute of 2 Geo. 2, c. 22, provided that if there were mutual debts between a plaintiff and a defendant then one debt might be set against the other. But under that statute and under the statute of 8 Geo. 2, c. 24, the claims on both sides had to be liquidated debts or money demands which could be ascertained with certainty at the time of pleading. Counterclaim is the creature of statute. The Supreme Court of Judicature Act, 1873, s. 24 (3), enabled the courts to hear a counterclaim: until then a cross-claim had to be advanced by a separate action. But before the Judicature Act, 1873, there were circumstances in which a defendant who was sued could, without bringing a separate action, set up certain contentions against the plaintiff. Thus, in answer to a claim for the price of goods sold, it became possible for a defendant to assert that the goods were of poor quality. He was allowed to do so by way of defending the claim made against him. That was not, however, by way of set-off.

Though a set-off when permissible is a defence, it is, of course, not correct to say that every defence is a set-off. The way in which the matter developed was explained by Parke B. in his judgment in *Mondel* v. *Steel*.[2] He said: "Formerly, it was the "practice, where an action was brought for an agreed price of a "specific chattel, sold with a warranty, or of work which was to "be performed according to contract, to allow the plaintiff to "recover the stipulated sum, leaving the defendant to a cross-"action for breach of the warranty or contract; in which action, "as well the difference between the price contracted for and the "real value of the articles or of the work done, as any conse-"quential damage, might have been recovered; and this course "was simple and consistent. In the one case, the performance "of the warranty not being a condition precedent to the payment "of the price, the defendant, who received the chattel warranted, "has thereby the property vested in him indefeasibly, and is "incapable of returning it back; he has all that he stipulated for "as the condition of paying the price, and therefore it was held "that he ought to pay it, and seek his remedy on the plaintiff's "contract of warranty. In the other case, the law appears to "have construed the contract as not importing that the "performance of every portion of the work should be a condition

[2] (1841) 8 M. & W. 858, 870.

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"precedent to the payment of the stipulated price, otherwise the "least deviation would have deprived the plaintiff of the whole "price; and therefore the defendant was obliged to pay it, and "recover for any breach of contract on the other side. But "after the case of *Basten* v. *Butter*,[3] a different practice, which "had been partially adopted before in the case of *King* v. *Boston*,[4] "began to prevail, and being attended with much practical "convenience, has been since generally followed; and the defen"dant is now permitted to show that the chattels by reason of "the non-compliance with the warranty in the one case, and "the work in consequence of the non-performance of the contract "in the other, were diminished in value. *Kist* v. *Atkinson*,[5] "*Thornton* v. *Place*.[6] The same practice has not, however, "extended to all cases of work and labour, as for instance, that "of an attorney, *Templer* v. *M'Lachlan*,[7] unless no benefit what"ever has been derived from it; nor in an action for freight; "*Shecls* v. *Davies*."[8]

Parke B. further said[9]: "It must however be considered, "that in all these cases of goods sold and delivered with a war"ranty, and work and labour, as well as the case of goods agreed "to be supplied according to a contract, the rule which has been "found so convenient is established; and that it is competent for "the defendant, in all of those, not to set off, by a proceeding "in the nature of a cross-action, the amount of damages which "he has sustained by breach of the contract, but simply to "defend himself by showing how much less the subject-matter of "the action was worth, by reason of the breach of contract; and "to the extent that he obtains, or is capable of obtaining, an "abatement of price on that account, he must be considered as "having received satisfaction for the breach of contract, and is "precluded from recovering in another action to that extent; "but no more."

Before the passing of the Judicature Acts there were circumstances in which a court of equity would restrain one who was a plaintiff in an action at law from proceeding until the further order of the court with the trial of his action at law, or might restrain him until the further order of the court from levying execution upon a judgment obtained in his favour. The Court of Equity would not act merely because there were cross-demands. The assistance of the Court of Equity would only be given to someone who could show some equitable ground for being protected against his adversary's demand. Lord Cottenham L.C. made that clear in 1841 in his judgment in *Rawson* v. *Samuel*.[10] Lord Cottenham examined the reported cases dealing with what he said was "familiarly" spoken of as "equitable set-off," and came to the conclusion that what had to be established was that there was an equity which went to impeach "the title to the legal demand."

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[3] (1806) 7 East 479.
[4] (1789) 7 East 481n.
[5] (1809) 2 Camp. 63, 64.
[6] (1832) 1 M. & Rob. 218.
[7] (1806) 2 B. & P.(N.S.) 136.
[8] (1814) 4 Camp. 119.
[9] 8 M. & W. 858, 871.

After the Judicature Acts were passed it was no longer necessary for a defendant to bring a separate action if he had a cross-claim. He could present his cross-claim in the existing action brought against himself. So counterclaim, the creature of the Judicature Acts, became possible. Furthermore, it was provided that equitable defences could be relied upon in actions at law: see section 38 of the Supreme Court of Judicature Act, 1925. Section 41 provides: "No cause or proceeding at any time pending in "the High Court or the Court of Appeal shall be restrained by "prohibition or injunction, but every matter of equity on which "an injunction against the prosecution of any such cause or "proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way "of defence thereto."

If a plaintiff had a demand which was a matter of equitable jurisdiction and brought proceedings in a court of equity, then not only could there be a set-off in regard to any liquidated demand but the courts of equity allowed a defendant to defend by showing that he had what was called an equitable set-off—that is, as Lord Cottenham pointed out, some equitable ground for being protected against the claim.

In *Young* v. *Kitchin*[11] a firm of builders, Downs & Co., erected certain buildings for the defendant, who then entered into possession of them. At that time a sum of money was due from the defendant to Downs & Co. in respect of the contract. Downs & Co. then assigned such sum to the plaintiff, who sued the defendant for it. But the defendant pleaded that Downs & Co. had been late in erecting the buildings, whereby he had suffered loss, and he also said that Downs & Co. had done defective work, and that the contract had provided that defects were either to be remedied or allowed for. The plaintiff demurred to the plea that Downs & Co. had not completed the buildings by the contract dates: he so demurred on the ground that the plaintiff as assignee of Downs & Co. could not be held liable for breaches of contract by Downs

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[10] (1841) Cr. & Ph. 161, 178.

[11] (1878) 3 Ex.D. 127.

& Co., and that such breaches constituted no answer to the plaintiff's claim. Cleasby B. said [12]: "In substance I think the "defendant is entitled to the benefit of this defence in reduction "of the plaintiff's claim. The Judicature Act, 1873, s. 25 (6) (i) "says that the assignment of a debt or other legal chose in "action shall be 'subject to all equities which would have been "'entitled to priority over the right of the assignee if this Act "'had not passed,' that is, subject to all equities which would "be enforced in a court of equity. I think this is a case where "in equity, the whole matter might be dealt with and the "plaintiff's claim settled, after deducting all that ought to be "deducted in respect of the failure to complete and deliver the "buildings." Cleasby B. pointed out that the defendant could not recover anything from the plaintiff but was entitled "by way "of set-off or deduction from the plaintiff's claim, to the damages "which he had sustained by the non-performance of the contract "on the part of the plaintiff's assignor." Cleasby B. further put the position as follows [13]: "He only meets the plaintiff's claim "by a counterclaim of damages arising out of the same contract."

The case of *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*[14] proceeded on the basis that a Court of Chancery would have recognized an equitable set-off. The plaintiffs claimed a sum of money for storing the defendants' vehicles. The defendants acknowledged that pursuant to contract the sum claimed would, but for what they asserted, have been due. They said, however, that as to one of the vehicles, which the plaintiffs were storing, itself worth more than what the plaintiffs claimed, the plaintiffs had either handed it over to someone else or had negligently allowed it to be stolen. So they said that their case was of such a nature that, quite apart from forming the basis for counterclaiming, it amounted to an equitable defence and that, accordingly, following section 38 of the Judicature Act, the court should give the same effect to it by way of defence as the Court of Chancery ought formerly to have given. If what a Court of Chancery would formerly have done would have been, on equitable grounds, to have granted an injunction against the prosecution of the plaintiffs' action, then, pursuant to section 41 of the Judicature Act, the equitable grounds could be relied upon by way of defence. The defendants were, in effect, saying: "We "ought not to have to pay you for storing our vehicles since "as to one of them you have allowed us to be deprived of it."

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[12] 3 Ex.D. 127, 130.

[13] Ibid. 131.

[14] [1949] 1 K.B. 107; 64 T.L.R. 381; [1948] 2 All E.R. 196.

The defendants said, therefore, that the plaintiffs ought not to have judgment for the amount claimed even though such judgment was stayed pending the hearing of the defendants' counterclaim, but that there should be leave to defend the plaintiffs' claim. Leave to defend was given.

The question which arose was whether, in the circumstances of the case, a court of equity would have recognized that the defendants had an equitable set-off. The judgment of Tucker L.J.[15] shows that counsel for the plaintiffs conceded that a court of equity would have recognized that the defendants had an equitable set-off. Mr. Dehn has submitted that this concession need not have been made. But Tucker L.J. thought that it was properly made, as is seen from his judgment.[16] He cited the judgment of Lord Cottenham L.C. in *Rawson* v. *Samuel*,[17] and proceeded [18]: " Those cases to which the Lord Chancellor referred " do, however, indicate the kind of circumstances in which the " Court of Chancery gave this equitable relief. As already " indicated, the case most in point was *Piggott* v. *Williams*,[19] " where there was a charge against a solicitor for negligence " which went directly to impeach the demand for payment which " he was making. In view of those authorities, I think that the " present case is one where, on the facts set out in the affidavit, " the Court of Chancery would clearly have allowed the defendant's claim as an equitable set-off against the plaintiff's claim."

Cohen L.J. was of the same opinion. He said [20]: " Once " Mr. Hale conceded, as, in my view, he was constrained by the " authorities to which we were referred, in particular by the " decision in *Piggott* v. *Williams*,[21] to concede, that the facts " alleged in the affidavit sworn for the defendants, if proved at " the trial, would establish a good equitable set-off, then it " followed that the appeal must succeed. Before the Judicature " Act, such claims were very often enforced by injunction, but it " is plain from section 41 that an injunction would not be the " appropriate way of giving effect to a set-off now and that effect " should be given to it, under section 38, as an equitable defence " if so pleaded. That being so, it seems to me to follow that the " matter must be treated as Cleasby B. indicated in *Young* v. " *Kitchin* [22] that equity would treat it, namely, by deducting from " the claim of the plaintiff all that ought to be deducted in respect

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[15] [1949] 1 K.B. 107, 109.
[16] Ibid. 113.
[17] Cr. & Ph. 161.
[18] [1949] 1 K.B. 107, 113.
[19] (1821) 6 Madd. 95.
[20] [1949] 1 K.B. 107, 114.
[21] 6 Madd. 95.
[22] 3 Ex.D. 127.

" of the failure, if failure be proved, to deliver the lorry that the " plaintiff received from the defendant."

Though the statutes of set-off were repealed by the Civil Procedure Acts Repeal Act, 1879, and the Statute Law Revision and Civil Procedure Act, 1883, there was in the former Act a saving for any jurisdiction or principle or rule of law or equity established, or confirmed (see section 4 (1) of the Act of 1879), and the preamble of the latter Act referred to certain enactments " . . . the subject-matter whereof is provided for by or under the " Supreme Court of Judicature Act, 1873, and the Acts amending " it or rules made pursuant thereto . . . " Section 39 (1) of the Judicature Act, 1925, which is in terms comparable with section 24, rule 3, of the Judicature Act, 1873, and Order 19, rule 3, of the Rules of the Supreme Court, are now operative. It has, however, been held in this court that the Judicature Acts conferred no new rights of set-off.

In *Stumore* v. *Campbell & Co.*[23] Lord Esher M.R. said: " The " Judicature Acts, as has been often said, did not alter the rights " of parties, they only affected procedure, so that no set-off could " now be maintained in such a case as this. Before these Acts " a person having a cross-claim must have raised it by a cross- " action; but these Acts have given a right to counterclaim. In " some of the cases language has been used which would seem " to imply that a counterclaim is sometimes in the nature of set- " off and sometimes not. No doubt matter is occasionally pleaded " as counterclaim which is really set-off; but counterclaim is " really in the nature of cross-action. This court has determined " that, where there is a counterclaim, in settling the rights of " parties, the claim and counterclaim are, for all purposes except " execution, two independent actions. If the plaintiff sustains his " claim, judgment goes for him on that; and if the defendant " sustains his counterclaim, judgment goes for him on that. " Either claim may be reduced by set-off. But if the plaintiff " succeeds in the one case and the defendant in the other, there " are two judgments which are independent for all purposes " except execution." Lopes L.J. said [24] that the Judicature Acts did not alter or intend to alter the rights of parties.

Since the passing of the Judicature Acts it is clear that reliance may be placed in any court upon any equitable set-off that formerly could only have been asserted in a court of equity: furthermore, counterclaims may be presented and there is no need to advance cross-claims in a separate action. But it is not the case that every cross-claim may be presented as a set-off even if in amount it equals or overtops the claim. Nor does the mere fact that the cross-claim is in some way related to the transaction which gave rise to the claim serve to invest the cross-claim with the quality of set-off.

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[23] [1892] 1 Q.B. 314, 316.

[24] Ibid. 318.

The position is, therefore, that since the Judicature Acts there may be (1) a set-off of mutual debts; (2) in certain cases a setting up of matters of complaint which, if established, reduce or even extinguish the claim, and (3) reliance upon equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition. The basis of (1) was explained in *Stooke* v. *Taylor*,[25] in which case Cockburn C.J. pointed out that in the case of a set-off, the existence and the amount of a set-off must be taken to be known to a plaintiff who should give credit for it in his action against the defendant. He pointed out that that reasoning did not apply to a counterclaim, which to all intents and purposes is an action by the defendant against the plaintiff, and in which the claims are not confined to debts or liquidated damages. In the same case he said[26]: "Set-off and counterclaim are both the creation of "statute, the common law not admitting of the action of a plain-"tiff against a defendant being met by an independent claim of "the defendant against the plaintiff, but leaving the defendant "to his cross-action. The effect of these two modes of proceeding "must, therefore, be sought in the statutes by which they were "introduced, and in their results; and when these are looked at, "it will be seen how essentially these two forms of procedure "differ. By the Statutes of Set-off this plea is available only "where the claims on both sides are in respect of liquidated "debts, or money demands which can be readily and without "difficulty ascertained. The plea can only be used in the way "of defence to the plaintiff's action, as a shield, not as a sword."

The cases within group (2) are those within the principle of *Mondel* v. *Steel*,[27] to which I have referred. In these cases there is a defence to the claim which the law recognizes (compare Sale of Goods Act, 1893, s. 53). The cases within group (3) are those in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff's claim. Reliance may be placed in a court of law upon any equitable defence or equitable ground for relief: so also any matter of equity on which an injunction against the

[25] (1880) 5 Q.B.D. 569, 576.

[26] Ibid. 575.

[27] 8 M. & W. 858.

prosecution of a claim might formerly have been obtained may be relied on as a defence. This may involve that there will have to be an ascertainment or assessment of the monetary value of the cross-claim which, as a matter of equity, can be relied on by way of defence. But this does not mean that all cross-claims may be relied on as defences to claims.

In *Bankes* v. *Jarvis* [28] the position was that the plaintiff's son had bought a veterinary surgeon's practice from the defendant, and in regard to a house of which the defendant was lessee, and which was used in connexion with the practice, the plaintiff's son had covenanted to pay the rent and to perform the covenants and to keep the defendant indemnified. After carrying on the practice for a time the plaintiff's son left the country after giving the plaintiff authority to sell the practice. The plaintiff sold it to the defendant. The sum of £50, being part of the agreed price, was owing by the defendant, but he had a claim against the plaintiff's son because he (the defendant) had had to pay £21 rent which the plaintiff's son had failed to pay, and had also had to pay £30 because the plaintiff's son had failed to perform the covenants in the lease. The plaintiff, suing as agent or trustee for her son, claimed £50 from the defendant. The defendant had a perfectly good claim for £51 damages against the plaintiff's son. It was held that the defendant could set up as a defence to the claim against him that the plaintiff's son (the cestui que trust of the plaintiff) was indebted to the defendant in a sum for unliquidated damages exceeding the amount of the claim.

The conclusion seems to me to be clearly correct and obviously fair. It would have been manifestly unjust if the defendant had had to pay £50 to the plaintiff (who was an agent or trustee for her son) at a time when the defendant had an unquestioned claim for £51 against the plaintiff's son, who had left the country. There was a close relationship between the dealings and transactions which gave rise to the respective claims. If the case had been brought before the Judicature Acts it would appear that the defendant would have had strong equitable grounds for asking a Court of Chancery to restrain the plaintiff from proceeding with her case. But since the Judicature Acts the position is that matters of equity on which such injunctions might formerly have been obtained may now be relied on by way of defence. Lord Alverstone C.J., in his judgment, said [29]: "If grounds exist which "formerly would have entitled a defendant to file a bill in Chancery

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[28] [1903] 1 K.B. 549; 19 T.L.R. 190.

[29] [1903] 1 K.B. 549, 552.

"to restrain the plaintiff from proceeding with his action, I think "a defendant is now enabled to rely on these grounds as a "defence to the action." Channell J., in his judgment, pointed out that if the defendant's claim had been for a liquidated amount then, as the plaintiff was suing as trustee for her son, there could even before the Judicature Acts have been a set-off. Channell J. added [30]: "Then the Judicature Act, and more especially the "rules, distinctly put an unliquidated claim on the same footing "as a liquidated claim for the purposes of set-off; and conse"quently the defendant's claim against the plaintiff's son, which, "if liquidated, could have been pleaded before the Judicature Act "as a set-off to the plaintiff's claim, can now, although unliqui"dated, be relied on as a defence to the extent of the claim." These words must, I think, be read in relation to the situation being dealt with in the case and in their context: they accord with the reasoning of Lord Alverstone C.J., and they explain the effect of the Judicature Acts in allowing reliance as a defence upon matters of equity which formerly might have called for injunction or prohibition. But I do not understand that Channell J. was saying that the Judicature Acts abolish entirely the difference between set-off and counterclaim, and, indeed, in view of the authorities, he could hardly have so intended.

It was pointed out in *Bankes* v. *Jarvis* [31] that the plaintiff, suing as trustee, "could not be in a better position than an "assignee for value suing in his own name against whom all "equitable defences can be relied on." The case is in line with *Young* v. *Kitchin* [32] and with *Newfoundland Government* v. *Newfoundland Railway Co.*[33] In the latter case, as in *Young* v. *Kitchin*, there was an assignment and the principle of *Young* v. *Kitchin* was followed. An assignee takes subject to equities. The result is, that by allowing certain matters of equity to be relied on by way of defence, there may in some cases be a setting up by way of defence of cross-claims which are for liquidated damages.

For the reasons that I have indicated, I consider that a cross-claim can be regarded as a set-off if in a court of law it would have been so regarded at the time of the Judicature Acts, or if it would have been regarded by a court of equity as the basis for equitable set-off or for giving protection on equitable grounds to a defendant.

What, then, is the result in the present case? The two sums of £69 11s. and £12 7s. 6d. were in substance and for all practical purposes sums which were extras to the defendant's contract. Although the latter of these was claimed to be recoverable as a sum due for breach of an implied term of the contract to allow reasonable access to the premises, it represented expenses incurred by the defendant in the course of doing work for the plaintiff. Hence, leaving aside the small item of £3 0s. 9d., the sum recovered as damages for trespass, the defendant was entitled to £81 18s. 6d. That was an amount which in effect remained due to the defendant under the contract under which he agreed to do work for the plaintiff. But he had done some of the work badly and because of this the plaintiff was entitled to £74 17s. 6d. from him. On the authorities to which I have referred, it seems to me that a court of equity would say that neither of these claims ought to be insisted upon without taking the other into account. It would not be equitable for the plaintiff to recover the £74 17s. 6d. while the £81 18s. 6d. was owing by her under the contract. If the defendant had assigned his claim to £81 18s. 6d. and if his assignee had sued the plaintiff, the plaintiff would have been entitled to set off her £74 17s. 6d. The position would be comparable with that in *Young* v. *Kitchin*,[34] to which I have referred above, and the passage from the judgment of Cleasby B. becomes applicable. It would be a case where in equity the whole matter could be dealt with. The assignee would take subject to equities and the plaintiff, if sued for the £81 18s. 6d., would be entitled "by way of set-off or deduction" to the damages which she had sustained by the non-performance or faulty performance of the contract on the part of the defendant.

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[30] [1903] 1 K.B. 549, 553.

[31] [1903] 1 K.B. 549.

[32] 3 Ex.D. 127.

[33] (1888) 13 App.Cas. 199, 213.

On the authorities to which I have referred, it seems to me that the defendant had an equitable set-off which defeated the plaintiff's claim. This conclusion does not in any way depend upon the terms used in the defence to the counterclaim. The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings: see *Sharpe* v. *Haggith*.[35]

In my judgment, therefore, the defendant succeeded in defeating the claim of the plaintiff and in establishing his right to £10 1s. 9d. on the counterclaim. It becomes necessary to consider what is the fair order to make as to costs on this altered and different basis. I think that there should be judgment for the defendant on the claim with costs on scale 4: that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs on scale 2: that the costs of the reference (which should be taxed on scale 3) should be dealt with as was directed by the judge, that is, that they be treated as referable as to one-half to the plaintiff and one-half to the defendant (a qualifying fee for one expert witness on each side being ordered).

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[34] 3 Ex.D. 127.

[35] (1912) 106 L.T. 13; 28 T.L.R. 194.

I would therefore allow the appeal.

SELLERS L.J. (read by Hodson L.J.). The defendant has, at the termination of this relatively expensive and protracted litigation, finished with a balance in his favour of £10 1s. 9d., which liability the plaintiff could have avoided if she had accepted the defendant's solicitors' suggestion in the letter of January 5, 1956, and had refrained from commencing the proceedings. In these circumstances, it seems an undue burden to put on the defendant to order him to pay the costs of the action, even although they are to be reduced by the defendant's costs of the counterclaim. The judge's reasons for so ordering included some provocation of the plaintiff by the conduct of a loutish workman of the defendant. This matter seems to have arisen in the evidence, but it had nothing to do with the defendant's conduct of the case. On the other hand, the plaintiff, who was of an excitable nature, so conducted herself in the course of the trial that she had to be committed to prison for contempt of court. She should not be further punished by depriving her of costs if she is in law entitled to them, but I cannot help feeling that this was a case where, on any view, the opinion of Denning L.J. in *Chell Engineering Ltd.* v. *Unit Tool and Engineering Co. Ltd.*[36] might have been invoked and applied—" that in most of these cases it is desirable that a " judge should consider whether a special order should be made as " to costs because the issues are often very much interlocked, and " the usual order of ' judgment for plaintiff on claim with costs " ' and for defendant on counterclaim with costs ' does not always " give a just result."

In *Childs* v. *Blacker*[37] the defendant, a tenant of a flat, had withheld rent to compensate for damages she claimed for breach of her tenancy agreement. She had tendered the balance of the rent, and at the trial the damages she recovered were greater than she had originally set off against the rent, so that the landlord recovered less rent than she had tendered to him. The county court judge thought that the *Chell Engineering Co.* decision laid down the procedure which was to be followed except in exceptional circumstances. The Court of Appeal unhesitatingly reversed the order and directed that the tenant should have the costs of the action.

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[36] [1950] 1 All E.R. 378, 383.

[37] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243.

There had been in that case a tender, but it was a tender only of the balance of the rent. There was no tender in the present case, but there was, as it turned out, no balance in favour of the plaintiff. In order to avoid the liability for costs, if correctly awarded here, and to meet the plaintiff's claim, which was pleaded at £266 14s. and had been originally advanced at nearly double, the defendant would have had to have tendered before action or have paid into court £75 or thereabouts. If this had been accepted (as it might have been) the defendant would have been left with no security for his counterclaim of £85 or thereabouts. This leads me to think that the fair order would have been to have set off the two amounts and given the defendant judgment on the counterclaim for £10 1s. 9d. and for the costs of the claim, counterclaim and reference to have been dealt with on that basis as the judge thought right.

The question which has been argued is whether the judge would have been entitled to make such an order in law and, if so, whether he was obliged to do so in the circumstances of this case. Set-off was relied on by paragraph 7 of the defence, and it was reflected in the report of the referee, who assessed the plaintiff's damages at £25 8s. 3d., having set off the defendant's counterclaim against the total claim allowed at £110 7s. 6d. This was also in accordance with the plea of the plaintiff in her defence to the counterclaim. Unfortunately for the plaintiff, the judge disallowed an item of £35 10s., reducing her claim to £74 17s. 6d., which was £10 1s. 9d. less than she owed the defendant.

If the judge had followed the form of the referee's report and had entered judgment for the defendant for the balance in his favour after the claim had been set off against the counterclaim, I think it would have been open to him to have done so and that it would have been in accordance with practice as it has developed. If he had no such power in law (which includes equity) it would, I think, be unfortunate, for costs would then seem to prevail over the substance of the matter. If in this case the result had been (and it would have meant but little adjustment of the cross-demands) that each was to recover £75 from the other, neither party would have received a penny out of the litigation but the defendant, who did not want to litigate, would have been ordered to pay the costs of the action.

Some counterclaims might be quite incompatible with a plaintiff's claim, in no way connected with it and wholly unsuitable to be used as a set-off, but the present class of action involving building or repairs, extras and incidental work so often leads to cross-claims for bad or unfinished work, delay or other breaches of contract that a set-off would normally prove just and convenient, and in practice, I should have thought, has often been applied, as indeed it was in the referee's report. It would serve to reduce litigation and its consequent costs. I would not be astute to restrict the right but rather to develop it and discourage litigation when no or little monetary benefit ensues on balance. It cannot, as I see it, make any difference which side commences proceedings in which cross-claims arise. If there is a set-off at all each claim goes against the other and either extinguishes it or reduces it.

Set-off in its infancy was restricted, as my Lord has indicated, by the cases cited. I refer not to the statutory set-off but to the practice of the courts of equity. But as far back as *Piggott* v. *Williams*,[38] in 1821, it is interesting to observe that the Vice-Chancellor thought that the course which the cause would probably take would be to retain the bill until an action for damages had been tried. The bill was for foreclosure of an estate pledged as security for the plaintiff's solicitor's costs. The client filed a cross-bill alleging that nothing was due and that the estate ought to be re-surrendered on the ground that the costs had been occasioned by the negligence and want of skill of the solicitor. The Vice-Chancellor held that the client, the plaintiff in the cross-bill, could restrain the defendant from enforcing his security "leaving the plaintiff's demand for damages unsatisfied." The purpose of this, it would appear, would be to see whether the damages as assessed when set off from the claim for costs would extinguish it or to what extent they would reduce it.

It seems to me that the *Mondel* case,[39] in 1841, also reveals the germ of the law's development. As the shipowners (the building owners) could not counterclaim in the shipbuilders' action they established a defence, pro tanto, for breach of contract and could sue nevertheless in a separate action for the balance of the damages suffered. The second action could only be maintained for the balance of the damages as part had been set off against the shipbuilders' claim in the first action.

After the Judicature Acts, which permitted a counterclaim in an action for the first time, as Channell J. pointed out in *Bankes*

[38] 6 Madd. 95.

[39] 8 M. & W. 858.

v. *Jarvis*,[40] this difficulty was removed and a defence of set-off to the claim and a counterclaim could be set up to extinguish a claim and recover any balance in the one action.

It is to be observed that *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*[41] was not cited to the court in the case of *Chell Engineering Co.*[42] Many cases were reviewed by Tucker L.J. in *Morgan's* case, and *Young* v. *Kitchin*[43] and *Morgan's* case itself would, as I read them, have supported the learned Commissioner's form of judgment in *Chell's* case, but would not have affected the appellate court's decision on the costs. In all these three cases the cross-claim arose from the breaches of the same contract as the one sued on.

In *Bankes* v. *Jarvis*,[44] where a set-off was allowed, the damages set off did not arise out of the contract for sale on which the plaintiff sued but on an earlier contract between the defendant and the plaintiff's son on whose behalf the plaintiff, his mother, was suing. As I read the case, the court would have held that a set-off existed against the son if he himself had been the plaintiff. He was in fact out of the country, but if he had been in the country and had been penniless and he had sued, the defendant would have been no less anxious to establish a set-off.

In *Newfoundland Government* v. *Newfoundland Railway Co.*[45] the Judicial Committee of the Privy Council allowed a set-off by the Government against the railway company, who sued as contractors, and against the other plaintiffs, the trustees of the bondholders. It was held that it was clearly conceivable that the Government might show damage arising from the non-construction of the railway, whether by the delay or otherwise. Lord Hobhouse stated the law as follows[46]: "There is no "universal rule that claims arising out of the same contract may "be set against one another in all circumstances. But their "Lordships have no hesitation in saying that in this contract the "claims for subsidy and for non-construction ought to be set "against one another. It is hardly necessary to cite authorities "for a conclusion resting on such well-known principles. Their "Lordships will only refer to *Smith* v. *Parkes*,[47] not so much on "account of the decision as for the sake of quoting a concise "statement by Lord Romilly of the principle which governed it. "He says,[48] 'All the debts sought to be set off against the

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[40] [1903] 1 K.B. 549.
[41] [1949] 1 K.B. 107.
[42] [1950] 1 All E.R. 378.
[43] 3 Ex.D. 127.
[44] [1903] 1 K.B. 549.
[45] 13 App.Cas. 199.
[46] Ibid. 199, 212.
[47] (1852) 16 Beav. 115, 119.
[48] Ibid. 213.

"'defendant Parkes are debts either actually due from him at "'the time of the execution of the deed' (this was the deed by "which the third party who resisted the set-off was brought in) "'or flowing out of and inseparably connected with his previous "'dealings and transactions with the firm.' That was a case of "equitable set-off, and was decided in 1852, when unliquidated "damages could not by law be the subject of set-off. That law "was not found conducive to justice, and has been altered. "Unliquidated damages may now be set off as between the "original parties, and also against an assignee if flowing out of "and inseparably connected with the dealings and transactions "which also give rise to the subject of the assignment. It appears "to their Lordships that in the cited case of *Young* v. *Kitchin*[49] "the decision to allow the counterclaim was rested entirely on "this principle."

In the present case the referee allowed the defendant £12 7s. 6d. for loss suffered by him because the plaintiff refused access to the defendant's workmen. I would regard that as clearly a matter of equitable set-off as it arises directly under and affected the contract on which the plaintiff herself relies. But that sum deducted from the plaintiff's claim of £74 17s. 6d. would not in itself be sufficient so to reduce the claim as to alter the scale of costs.

The items for extras totalling £69 11s. include two charges in connexion with the moving in of the plaintiff's household goods, and the other item of £3 0s. 9d. is a claim for damages in trespass as the plaintiff had apparently thrown away some tools of the defendant's workmen. These two items are closely associated with and incidental to the contract of June 14, 1954, on which the plaintiff sues for breach, and in my opinion they also should have been allowed as a set-off.

I agree, therefore, that the appeal should be allowed and an order for costs made in the terms proposed.

Appeal allowed with costs.
Leave to appeal to House of Lords refused.

Solicitors: *H. B. Wedlake, Saint & Co.; Ashurst, Morris, Crisp & Co.*

A. W. G.

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[49] 3 Ex.D. 127.

1957
Dec. 11, 19.

Lord Goddard C.J., Devlin and Pearson JJ.

KRUHLAK *v.* KRUHLAK.

Bastardy — " Single woman " — Wife's application against husband — Child born during previous marriage — Wife living apart from husband — Separation order containing non-cohabitation clause — Whether wife a " single woman "—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

A woman who had given birth to a bastard child subsequently married the man alleged to be the father of the child, but the circumstances were apparently such that the child was not legitimated by the marriage. After some years a separation order containing a non-cohabitation clause was made in favour of the wife on the ground of the husband's cruelty. The wife then issued a complaint under section 3 of the Bastardy Laws Amendment Act, 1872, against the husband applying for maintenance in respect of the child, and the husband contended that, as against him, the wife could not establish herself to be a " single woman " within the meaning of the Act:—

Held, that a married woman living apart from her husband might, if circumstances permitted, be regarded as a single woman for the purposes of the Bastardy Laws Amendment Act, 1872, and that as at the time of her application the wife was living apart from her husband under the separation order she was entitled to take proceedings against him in respect of the child just as she might against any other man.

Mooney v. *Mooney* [1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812 distinguished and explained.

Per Devlin J. The fact of singleness is determined by looking at the actual state to which the woman has been reduced and not at her status in the eyes of the law, and a woman whose husband has deserted her or cast her off can say to him with as much force as she can say it to anyone else, that he has reduced her to living as a single woman.

CASE STATED by Osgoldcross, West Riding of Yorkshire, justices sitting at Castleford.

On April 5, 1957, a complaint under section 3 of the Bastardy Laws Amendment Act, 1872,[1] was preferred by the appellant, Hilda Mary Kruhlak, against the respondent, Hilko Kruhlak, alleging that he was the father of a bastard child of which she was delivered on December 2, 1953.

The following facts were found by the justices. The appellant gave birth to a girl named Joan on December 2, 1953, at 7.30 a.m., of which she alleged the respondent to be the father. At

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[1] Bastardy Laws Amendment Act, 1872, s. 3: " Any single woman who " may be . . . delivered of a bastard " child . . . may . . . make application " . . . for a summons to be served on " the man alleged by her to be the " father of the child, . . ."

10 a.m. on the same day (December 2, 1953) an order of decree nisi was made absolute in favour of the appellant's former husband from whom she had been living separate and apart since 1940. The appellant and the respondent, who had been on intimate terms since September, 1952, were married on December 19, 1953, and there was one child of that marriage, a boy, John, born in September, 1955. On March 26, 1957, a separation order was made in favour of the appellant against the respondent by justices sitting at Leeds, on the ground of persistent cruelty, when the appellant was also awarded the custody of the boy John. That separation order contained a non-cohabitation clause.

On behalf of the appellant it was contended that she was a single woman quoad the respondent in relation to the child who was the subject of the complaint.

On behalf of the respondent it was contended that the appellant could not establish herself to be a single woman quoad the respondent, he being her husband.

The justices were of the opinion that there was a distinction from the facts in *Mooney* v. *Mooney* [2] in that the appellant had obtained an order against the respondent on the ground of persistent cruelty, but that in view of the judgment in that case it was not open to them to hold that a married woman who summoned her husband could be heard to say that she was a single woman, and accordingly they dismissed the complaint.

The appellant appealed, and the question for the opinion of the court was whether on the facts found the case might be distinguished from that of *Mooney* v. *Mooney* [2] and the appellant held to be a single woman quoad the respondent in relation to the child who was the subject of the complaint.

R. D. Ranking for the appellant wife. *Mooney* v. *Mooney* [2] should be distinguished. In that case the wife was in desertion and the court held that she could not be regarded as a single woman as against her husband. Here the wife was not in desertion but was living apart from her husband under a separation order. The result of such an order is to give a woman the status of a feme sole: *Boyce* v. *Cox* [3]; the wife, therefore, can claim to be a single woman.

J. B. Deby for the respondent husband. It is immaterial that by reason of the separation order the facts in *Mooney* v.

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[2] [1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812.

[3] [1922] 1 K.B. 149.

Mooney[4] can be distinguished from those in this case, because in *Mooney* v. *Mooney*[4] the principle was clearly laid down that a wife cannot bring bastardy proceedings against her husband. The court is not bound to follow *Boyce* v. *Cox*[5] in the present case. The decision in that case turned on section 5 of the Summary Jurisdiction (Married Women) Act, 1895, whereby a separation order had the effect of a decree of judicial separation, and on section 26 of the Matrimonial Causes Act, 1857, under which a woman who had obtained a decree of judicial separation was to be regarded as a feme sole for "the purposes of contract, "and wrongs and injuries, and suing and being sued in any civil "proceeding." It is submitted that the statement in *Boyce* v. *Cox*[6] that "The Matrimonial Causes Act, 1857, s. 26, says "that a woman who obtains such a decree [of judicial separation] "is to be regarded as a feme sole" is inaccurate. Section 26 did not grant to such a woman the status of a feme sole but merely certain incidents attaching to that status specifically limited to the purposes set out in the section; those purposes do not include bastardy proceedings, which are not a "civil proceed-"ing" but are of a quasi-criminal nature. Section 26 of the Matrimonial Causes Act, 1857, was repealed by, and replaced by a similar provision in section 194 (1) of, the Supreme Court of Judicature Act, 1925; and the Law Reform (Married Women and Tortfeasors) Act, 1935 (see section 5 (1) and Schedule I), substituted for section 194 (1) of the Act of 1925 a new section which did not repeat the provision that a woman who had obtained a decree of judicial separation was to be regarded as a feme sole. Section 1 of the Act of 1935 gave to all married women the rights previously accorded to a woman with a decree of judicial separation, so that since that Act there has been no need to make any special provision for the woman with a decree of judicial separation: see section 21 of the Matrimonial Causes Act, 1950—all that is now left of section 26 of the Act of 1857—which is concerned solely with property. The fact that neither that section nor the Act of 1935 makes any reference to a married woman being regarded as a feme sole reinforces the submission that section 26 of the Act of 1857 was not intended to grant status. As to the nature of judicial separation, the passage in Cheshire's Private International Law, 5th ed. (1957), p. 387, on that topic is prayed in aid: "A petition for this relief, unlike a suit for divorce, does

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[4] [1953] 1 Q.B. 38.

[5] [1922] 1 K.B. 149.

[6] Ibid. 151.

"not make a permanent, or indeed any, change in the status of "the parties. The object is to obtain protection from some of "the consequences of that status and to suspend some of the "mutual obligations of the parties; the effect of the decree is to "leave the status of the parties unchanged," and *Armytage* v. *Armytage* [7] is cited. *Boyce* v. *Cox* [8] was not cited in *Mooney* v. *Mooney* [9]; it is submitted that the decision in *Boyce* v. *Cox* [10] that a separation order effected a change of status is wrong, and that, therefore, the wife in this case is in the same position as the wife was in *Mooney* v. *Mooney*.[11]

The purpose of the separation order was to protect the wife and relieve her from the performance of certain obligations, but in all the cases in which a married woman has been held to be a single woman for the purposes of the Bastardy Laws Amendment Act, 1872, the wife had either been left by the husband or had lost the right to be supported by him: see the judgment of Atkinson J. in *Jones* v. *Evans* [12] and the citation made therein from the judgment of Kennedy J. in *Jones* v. *Davies*.[13] The wife in this case has taken proceedings against the husband; she is nevertheless a wife who had the right to be supported by her husband but who has chosen not to have that support. Her position, therefore, is different from that of a wife who has forfeited that right by her own conduct and whose husband has put her away.

[LORD GODDARD C.J. It would be strange if a wife who is not at fault is in a less advantageous position than she would be if she were to blame.]

A woman who has not committed a matrimonial fault is entitled to require her husband to support her; where it is by her own choice that he is not doing so she cannot, as against him, claim to be considered as a single woman.

There is also the further point, not taken before the justices, that, if the husband is proved to be the father of the child, then the child, being born on the same day as the decree nisi was made absolute, was legitimated under section 1 of the Legitimacy Act, 1926.*

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[7] [1898] P. 178; 14 T.L.R. 480.
[8] [1922] 1 K.B. 149.
[9] [1953] 1 Q.B. 38.
[10] [1922] 1 K.B. 149.
[11] [1953] 1 Q.B. 38.
[12] [1944] K.B. 582, 588; 60 T.L.R. 374; [1945] 1 All E.R. 19.
[13] [1901] 1 K.B. 118, 121.

* *Reporter's note*: In *Kruhlak* v. *Kruhlak* (*No.* 2) [1958] 1 W.L.R. 606; [1958] 2 All E.R. 292 the Divisional Court held that the child was legitimated by the marriage of the parents by virtue of s. 1 (1) of the Legitimacy Act, 1926.

R. D. Ranking in reply. For the last hundred years the status of a married woman who has obtained a decree of judicial separation has been regarded as that of a feme sole. The Act of 1857 conferred rights of property upon her and gave her a position similar to that of a single woman. That position was preserved by the Supreme Court of Judicature Act, 1925, and the only difference which has been made by the Law Reform (Married Women and Tortfeasors) Act, 1935, is that now all married women have rights of their own, so that since that Act there is no need to place wives who have obtained a decree of judicial separation into a separate category: see section 1, which must be read in conjunction with the schedule.

Cur. adv. vult.

December 19. LORD GODDARD C.J. I have communicated with the clerk to the justices of Osgoldcross in the West Riding and asked him the terms of the separation order which was referred to in the case. The court particularly desired to know whether there was a non-cohabitation clause in that order, and the justices' clerk has informed us that there was. That point was not specifically dealt with in the case. Devlin J. will read the first judgment.

DEVLIN J. The question in this case is whether the appellant can be said to be a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, notwithstanding the fact that she is married to the respondent, by whom she had previously had an illegitimate child.

It has been settled by a series of cases that in construing the expression " single woman " the courts will have regard to the de facto position of the woman rather than to her status in the eyes of the law. Thus, a woman who has been legally separated from her husband or one who lives apart from him and has by her conduct forfeited the right to maintenance has been held to be a single woman. The importance of this last factor is that until 1948 a man who married a woman with an illegitimate child was bound to support the illegitimate child as well as any children of his own by the marriage. So if a wife could obtain maintenance for the child both from the husband and from the putative father there would have been a double liability; and this indeed was the reason why relief under the Act of 1872 was given to a single woman. The National Assistance Act, 1948, now provides that a husband is bound to support only his own children.

Until *Mooney* v. *Mooney* [1] all the cases which the courts had considered were cases in which the woman, having had an illegitimate child by one man, had later gone off and married someone else. *Mooney* v. *Mooney* [1] was a case, as is the present one, in which the woman married the putative father; and it was also a case, as is this one, in which the subsequent marriage did not legitimate the child. Such a case would have raised no problem before the Act of 1948, since before then the man would have been obliged either as husband or putative father to support the child anyway. But after the Act of 1948 the only way in which the woman could get maintenance for the child was by means of a bastardy order. The artificiality of the construction which the courts have given to the expression "single woman" is brought into high relief when a wife asserts against her own husband that she is a single woman. Nevertheless, once the point is reached when the fact of singleness is determined by looking at the actual state to which the woman has been reduced and not at her status in the eyes of the law, it seems to me that a woman whose husband has deserted her or cast her off can say to him, with as much force as she can say it to anyone else, that he reduced her to living as a single woman. If she cannot say that, it would mean that he escapes the obligations of putative fatherhood first by marrying her and then by committing a matrimonial offence.

In *Mooney* v. *Mooney* [2] the husband and putative father supported the illegitimate child from the time of the marriage until his wife left him. She left him in circumstances which precluded her from obtaining a maintenance order on the ground of desertion; he was willing to have her back and support her and her child but she refused to return to him. This raised the question of whether a woman can choose to reduce herself to the condition of a single woman within the meaning of the Act by deserting her husband. There is no case in which the courts have permitted that to be done.

The court in *Mooney* v. *Mooney* [2] were dealing with a case in which the husband was willing to give his wife all the benefits of marriage and to treat his illegitimate child just as though it had been born in wedlock. In such circumstances the court held that a wife could not be heard to say, as against her husband, that she was to be treated as if she were a single woman.

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[1] [1953] 1 Q.B. 38.

[2] Ibid.

Now the facts in the present case are entirely different. It is not the appellant who has broken off the marriage; on March 26, 1957, she obtained a separation order including a non-cohabitation clause against the respondent on the ground of persistent cruelty.

Mr. Deby, who has argued this case extremely well, has contended that *Mooney* v. *Mooney* [3] must be taken as laying it down as an invariable rule that whatever the circumstances a wife can never claim as against her husband that she is a single woman. There are expressions in the judgment which, taken by themselves, might bear that interpretation, particularly the one to which I have already referred, namely, that when a married woman summons her husband she cannot be heard to say that she is a single woman. But the phrase "cannot be heard" is not being used as if to indicate that it is a question of estoppel. No such principle can apply to the construction of a statute. If the facts of a case make a woman a single woman within the meaning of the statute, then she is so for all the purposes of the statute; and different constructions cannot be given to the statute according to the different status of the persons who may be parties to proceedings that are brought under it. The expression cannot be heard means, I think, that in all the circumstances of that case it was an impossible contention for the appellant to make. In the circumstances of this case I can see nothing to prevent the appellant from relying on the separation order in the same way as has been done in the past to justify her claim that she is a single woman.

The justices considered this case to raise a difficult problem, as indeed it does. They thought that it was not for them to find ways of distinguishing *Mooney* v. *Mooney* [3] and that such a matter had better be left for the High Court; they invited the parties to apply for this case to be stated. In my judgment, the appeal should be allowed, the question stated should be answered in the affirmative and in favour of the appellant, and the justices should now proceed to the hearing of the appellant's complaint.

I desire to add that, in the course of the argument, Mr. Deby raised the point as to whether the child had not been legitimated.* The position was that on December 19, 1953, the appellant was married to the respondent. Seventeen days before that, on December 2, 1953, the appellant had given birth to the illegitimate child, a girl, whose father she alleged the respondent to be. If that allegation is right the subsequent marriage would, under section 1 (1) of the Legitimacy Act, 1926, subject to section 1 (2) of the Act, have legitimated the child. But section 1 (2) provides that nothing in the Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born. In fact the appellant had been married to another man, from whom she had been separated since 1940 and whom she divorced before she married the respondent. The decree absolute dissolving this earlier marriage was pronounced at 10 a.m. on December 2, 1953, the child having been born 2½ hours earlier at 7.30 a.m. on the same day. Since the birth of the child and the dissolution of the marriage occurred on the same day, there may be room for argument about the effect of section 1 (2). If it does not apply, and assuming, of course, the paternity of the respondent, he would be liable on any view to maintain the child. But this possibility did not occur to anyone until it was perceived by Mr. Deby, who has appeared for the appellant in this court. All that the justices were asked to deal with was a summons by the appellant under the Bastardy Laws Amendment Act, 1872, and the illegitimacy of the child was not put in issue. The only question stated in the case is whether the appellant can be held to be a "single "woman" within the meaning of that Act. That is the only point with which I have dealt in this judgment, and the other point as to legitimacy remains open for what it is worth.

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[3] [1953] 1 Q.B. 38.

* *Reporter's note*: See *Kruhlak* v. *Kruhlak* (*No.* 2) [1958] 1 W.L.R. 606; [1958] 2 All E.R. 292, and note, supra.

Lord Goddard C.J. I agree in the result with the judgment that has just been delivered, but as I was a party to the decision in *Mooney* v. *Mooney*[4] I desire to give my reasons, which I can do quite shortly. It is firmly established that for the purposes of the Bastardy Laws a married woman living apart from her husband may be regarded, if the circumstances permit, as a single woman and so entitled to take proceedings in bastardy. I say if the circumstances permit because unless non-access can be proved or inferred the child would be regarded as legitimate if born in wedlock. If a woman was in fact living apart from her husband and by her adultery had lost her title to maintenance in his home it was said by Littledale J., in *Rex* v. *Flintan*,[5] "she returns to the same state as if she were not married."

[4] [1953] 1 Q.B. 38.

[5] (1830) 1 B. & Ad. 227, 230.

If she is separated either by deed or by the order of the court the presumption of access and the legitimacy of the child is rebutted provided that the parties are actually living apart under the deed or in consequence of the order. As the parties in this case are living apart under an order of the court which contains a non-cohabitation clause there can be no doubt that had this woman borne a child conceived since the date of the order she could have taken proceedings as a single woman against the putative father. The difficulty that arises here is because the mother of the child married the alleged father after the birth of the child. A married woman who was living with her husband at the time when the application was made has never been treated as a single woman, but as in this case she was living apart from him under this order I do not see why she should not take proceedings against him as the child was born before marriage just as she could against any other man. *Mooney* v. *Mooney*[6] was different. That, again, was a case where a woman sought an order against her husband and it was not disputed, apparently, that the husband was the father of the child as he had cohabited with the mother before marriage. But she had left her husband against his will and he was ready to receive her back but she would not return. There seemed, accordingly, no ground on which she could be regarded as a single woman. I agree that this appeal should be allowed. The case raised a difficult point for the justices and I think that it was quite reasonable for them to say, as they did, that if it was to be distinguished from *Mooney's* case[6] the distinction should be drawn by this court.

PEARSON J. I agree. It is clear from the many cases decided under the Bastardy Laws Amendment Act, 1872, that the expression " single woman " cannot be interpreted literally but has an extended meaning including some married women. In my view, the principle to be deduced from the previously decided cases is simply that a married woman who is for the time being effectively separated from her husband may be regarded as a single woman for the purposes of the Act of 1872, and the material time is the time of the application. Here we have a married woman who was living apart from her husband under a separation order. There could be no more effective separation than that. I have referred to the cases, and I have not found anything which would conflict with the apparently obvious proposition that a woman in that state can be treated as a single woman having regard, of course, to the other decisions under which it becomes plain that the simple literal meaning cannot be given to that expression. I therefore agree with the order proposed.

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[6] [1953] 1 Q.B. 38.

Appeal allowed.

Solicitors: *Long & Gardiner for A. Maurice Smith, Castleford; Collyer-Bristow & Co. for Alf Masser & Co., Castleford.*

J. F. L.

EASTBOURNE CORPORATION *v.* FORTES ICE CREAM PARLOUR (1955) LTD.

1958
April 17, 30.

Lord Goddard C.J., Hilbery and Donovan JJ.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether development occurred—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 23 (2) (4).

In or about June, 1956, a company placed an automatic coin-operated ice-cream sales machine on the forecourt outside its premises, which it used as an ice-cream parlour. There were holes in the base of the machine whereby it could be bolted to the ground when in use; the refrigeration plant in the machine was operated by electricity supplied through a cable. No planning permission was sought or obtained for the machine and by an enforcement notice dated May 16, 1957, served by the local planning authority, the company was required to remove the machine. The company appealed to the justices against the notice under section 23 (4) of the Town and Country Planning Act, 1947.[1] The justices

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to the "provisions of this section and to the "following provisions of this Act, per"mission shall be required under this "Part of this Act in respect of any "development of land which is "carried out after the appointed day.

"(2) In this Act, except where "the context otherwise requires, the "expression 'development' means "the carrying out of building, "engineering, mining or other opera"tions in, on, over or under land, or "the making of any material change "in the use of any buildings or other "land:

"Provided that the following "operations or uses of land shall not "be deemed for the purposes of this "Act to involve development of the "land, that is to say:—(*a*) the "carrying out of works for the main"tenance, improvement or other "alteration of any building, being "works which affect only the interior "of the building or which do not "materially affect the external "appearance of the building; . . .

"(3) For the avoidance of doubt it "is hereby declared that for the pur"pose of this section—. . . (*b*) the "deposit of refuse or waste materials "on land involves a material change

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held that there had been no development within section 12 (2) of the Act and quashed the notice. On appeal by the local authority:—

Held (Lord Goddard C.J. dissenting), that the justices had no jurisdiction under section 23 (4) of the Act of 1947 to determine

"in the use thereof, notwithstanding that the land is comprised in a site already used for that purpose, if the superficial area or the height of the deposit is thereby extended:

"Provided that nothing in paragraph (*b*) of this subsection shall be deemed to require permission in respect of the deposit of refuse or waste materials on a site already used for that purpose if the height of the deposit does not exceed the level of the land adjoining such site, and the superficial area of the deposit is not thereby extended. . . .

"(5) Notwithstanding anything in this section, permission shall not be required under this Part of this Act—(*a*) in the case of land which, on the appointed day, is being used temporarily for a purpose other than the purpose for which it is normally used, in respect of the resumption of the use of the land for the last-mentioned purpose; (*b*) in the case of land which, on the appointed day, is normally used for one purpose and is also used on occasions, whether at regular intervals or not, for any other purpose, in respect of the use of the land for that other purpose on similar occasions after the appointed day; (*c*) in the case of land which on the appointed day is unoccupied, in respect of the use of the land for the purpose for which it was last used:

"Provided that—(i) in determining for the purposes of paragraph (*a*) of this subsection the purposes for which land was normally used and in determining for the purposes of paragraph (*c*) of this subsection the purposes for which land was last used no account shall be taken of any use of the land begun in contravention of previous planning control within the meaning of section seventy-five of this Act; (ii) paragraph (*c*) of this subsection shall not apply to land which was unoccupied on the seventh day of January nineteen hundred and thirty-seven and has not been occupied since that date."

S. 17: "(1) If any person who proposes to carry out any operations on land or make any change in the use of land wishes to have it determined whether the carrying out of those operations or the making of that change in the use of the land, would constitute or involve development of the land within the meaning of this Act, and, if so, whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may, either as part of an application for such permission, or without any such application, apply to the local planning authority to determine that question.

"(2) The foregoing provisions of this Part of this Act shall, subject to any necessary modifications, apply in relation to any application under this section and to the determination thereof as they apply in relation to applications for permission to develop land and to the determination of such applications:

"Provided that where it is decided by the Minister under any of the said provisions that any operations or use to which an application under this section relates would constitute or involve development of the land, or that an application for permission is required as aforesaid in respect thereof, that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use."

S. 23: "(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this

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whether in fact development within section 12 of the Act of 1947 had taken place; they must assume that it had and their jurisdiction was strictly limited to ascertaining whether permission had been granted or whether the alleged development fell within the class of development for which permission was not required.

Keats v. *London County Council* [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303 applied.

Norris v. *Edmonton Corporation* [1957] 2 Q.B. 564; [1957] 2 All E.R. 801 not followed.

East Riding County Council v. *Park Estate* (*Bridlington*) *Ltd.* [1957] A.C. 223; [1956] 2 All E.R. 669 considered.

Per Lord Goddard C.J. Where justices are hearing an appeal under section 23 (4) of the Act of 1947 they have jurisdiction to consider whether the operations or change of use complained of constitute development or not.

CASE STATED by Eastbourne justices.

On June 13, 1957, a complaint was preferred by the respondents, Fortes Ice Cream Parlour (1955) Ltd., for an order to quash or vary a notice dated May 16, 1957, of the appellants, the Eastbourne Corporation, relating to premises at 247, Terminus Road. Eastbourne, and expressed to be an enforcement notice served pursuant to section 23 of the Town and Country Planning Act, 1947. The notice was in the following terms: "Whereas an automatic ice-cream sales machine has been affixed to and installed "on the forecourt of the premises known as 247, Terminus Road, "Eastbourne, and whereas the aforementioned operations consti-"tute development within the meaning of the above Act and

"Part of this Act, or that any con-"ditions subject to which such per-"mission was granted in respect of "any development have not been "complied with, then, subject to any "directions given by the Minister, "the local planning authority may "within four years of such develop-"ment being carried out, if they "consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section.

"(2) Any notice served under this "section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged to "have been carried out without the "grant of such permission . . . "may . . . require . . . the discon-"tinuance of any use of land . . .

"(4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may, at any time within "the period mentioned in the last "foregoing subsection, appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(*a*) if satisfied that per-"mission was granted under this Part "of this Act for the development to "which the notice relates, or that no "such permission was required in "respect thereof, or, as the case may "be, that the conditions subject to "which such permission was granted "have been complied with, shall "quash the notice to which the appeal "relates; . . . (*c*) in any other case "shall dismiss the appeal: . . ."

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"(a) the said operations have been carried out without the grant "of planning permission under Part III of the said Act; Now "therefore the [corporation] do hereby give you notice in pursuance of their powers as local planning authority under sections "23 and 24 of the aforementioned Act to:—remove the said automatic ice-cream sales machine together with the electric cable "attached thereto and further to remove the bolts and other "fittings securing the said machine to the said forecourt within "21 days after the date on which this notice becomes effective."

The justices found the following facts: The premises at 247, Terminus Road, comprised a shop on the ground floor and basement of a building at the corner of Terminus Road and Burlington Road. They were occupied by the company as an ice-cream parlour and restaurant under a lease held in trust for the company by one Forte, a director thereof. There was a paved forecourt adjoining the public footway of the above roads, and the shop-front facing these roads had a black base, large glass windows displaying food menus and advertisements, and a facia-board at a height of from 12 to 14 feet above the forecourt bearing the words "Fortes "Ice Cream Parlour."

In or about June, 1956, the company bought an automatic coin-operated ice-cream sales machine and had it placed on the forecourt in the corner of its premises nearest to the adjoining premises at 245, Terminus Road. The machine was blue and white in colour, was 6 feet 2 inches high, approximately 30 inches square, and weighed approximately 5½ hundredweight. The machine was not attached to the forecourt by bolts or otherwise. The refrigeration plant in the machine was operated by electricity supplied through a cable (housed in a ⅝th in. conduit) which was connected to the mains supply in the aforesaid premises. The conduit, black in colour, came from a grille in the base of the shop-front and was fitted by an electrician from a near-by shop. No planning permission under the Town and Country Planning Act, 1947, was sought or granted on any application relating to the machine. The company's machine was removed on only one occasion, June 24, 1957, when photographs were taken of the premises without the machine, which was thereafter immediately replaced. It took about five minutes to disconnect the electricity cable and remove the machine. By fitting a "niphan" switch the time taken to disconnect the cable could be considerably shortened.

The company contended that the justices were not bound to assume that the matters alleged in the enforcement notice had occurred or, insofar as they had occurred, that they constituted development, but could determine whether or not any operations amounting to development had occurred; that neither what was alleged in the notice, nor what in fact had occurred, amounted to the carrying out of development within section 12 of the Act of 1947, and accordingly the justices might be satisfied that no permission was required in respect thereof.

Alternatively, the company contended that any operations carried out did not involve development by reason of proviso (*a*) to section 12 (2) of the Act of 1947, and it was further contended that the requirements of the enforcement notice (except in so far as they were incapable of performance) had been satisfied (before the beginning of the period allowed for this purpose) on June 24, 1957; that in any event the form of notice used in this case was inappropriate. The company conceded that placing a machine on land might in some cases involve a material change of use, but not in this case.

The corporation contended that the installation of the machine constituted development within section 12 (2) of the Act of 1947, and as such required planning permission under section 12 (1) of the Act.

The justices were of the opinion that it was open to them to determine whether the matters alleged as constituting development had in fact occurred and whether, if so, they constituted development within section 12 (2) of the Act of 1947; in this case there had been no such development. They therefore quashed the notice.

The corporation appealed.

Peter Boydell for the corporation. Under section 23 of the Act of 1947 there is no means of challenging a decision of the local planning authority that there has been development. All the authorities show that the grounds on which the justices can quash an enforcement notice are limited. They cannot go into the matter and decide whether there is development at all. [Reference was made to *Mead* v. *Chelmsford Rural District Council.*[2]] In *Keats* v. *London County Council*[3] the local planning authority served an enforcement notice on the owner alleging that the user of his premises for light industrial purposes was unpermitted development. The owner contended that the notice was out of time, since development had been carried out four years before the date of the notice. This court held that the justices must assume the notice was regular and the justices had no jurisdiction under section 23 to inquire whether development had taken place prior to the current user of the premises. *Keats'* case [3] is relied on.

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[2] [1953] 1 Q.B. 32; sub nom. *Mead* v. *Plumtree* [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

[3] [1954] 1 W.L.R. 1357.

There is nothing in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[4] to suggest that *Keats'* case [5] has been overruled. In the *East Riding* case Lord Simonds said [6] that the grounds on which a notice can be quashed are strictly limited. If the legislature intended the justices to have the wide powers they have in criminal proceedings, it could have said so.

[Lord Goddard C.J. If a landowner objects to a notice on the ground there has been no development, must he wait until he is prosecuted?]

That cannot affect the construction of section 23 (4), and on that the court was right in *Keats'* case.[7] Section 17 permits a landowner to apply to a local planning authority to determine whether contemplated user constitutes development. The proviso to that section shows that the decision of the local authority does not prejudice the landowner's rights before the justices. If section 23 does not give the justices power to decide the matter, the proviso to section 17 cannot. To ascertain the power of the justices one must look at section 23 (4) (*a*).

[Hilbery J. What is the use of the proviso?]

[Lord Goddard C.J. It was never cited in *Keats'* case.[7]]

To put it in another way. If an owner subsequently goes to the court he is not precluded from so going because of his application under section 17. In *Keats'* case [8] Parker J. said that the justices must assume development had taken place. Whatever is the proper view of the proviso to section 17, that does not give the justices power under section 23 to consider whether development has taken place.

J. D. James and *H. H. Sebag-Montefiore* for the company. All the cases except *Keats'* [9] support the contention that the justices had power to determine whether development had taken place. *Keats'* case [9] is inconsistent with the *East Riding* case,[10] in which it was alleged that development had taken place without permission. It was proved that the alleged development had occurred before the appointed day. The House of Lords quashed the notice because they were satisfied that no development had occurred after the appointed day.

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[3] [1954] 1 W.L.R. 1357.

[4] [1957] A.C. 223.

[5] [1954] 1 W.L.R. 1357.

[6] [1957] A.C. 223, 231.

[7] [1954] 1 W.L.R. 1357.

[8] Ibid. 1361.

[9] [1954] 1 W.L.R. 1357.

[10] [1957] A.C. 223.

[LORD GODDARD C.J. If it is permissible to ask whether there was development before 1947, it must also be permissible to inquire whether there has been any development at all.]

[DONOVAN J. In the *East Riding* case[10] there was development before 1948. It is another question where there is an enforcement notice and a landowner says that there has been no development. The two things are not the same. In the first case it is conceded that there has been development; in the second the allegation is that there has been no development.]

If there has been development before 1948, there has been no development within the Act. If nothing at all has been done, there has been no development within the Act. In fact in the *East Riding* case[10] the House of Lords read the notice as alleging development after the appointed day. That allegation was disproved; but if *Keats*[11] were good law the House of Lords would have assumed the allegation to be true.

Reliance is also placed on *Norris* v. *Edmonton Corporation*,[12] where, it is submitted, this court correctly interpreted the decision in the *East Riding* case.[13] The decision in *Perrins* v. *Perrins*[14] has been overruled by *Francis* v. *Yiewsley and West Drayton Urban District Council*.[15] A landowner can wait until he is prosecuted, but he need not do so. He can now take the objection that there has been no development at this stage, or he can take it if prosecuted, or he can sue the authority for trespass. It is convenient for everyone to test a landowner's position at an early stage.

Boydell in reply. There was no inquiry in the *East Riding* case[16] as to whether development had taken place. There was no allegation that there was development. It was said expressly in the notice that development occurred before 1948.

[HILBERY J. Within what part of section 23 (4) (*a*) were the justices entitled to quash the notice?]

Three of their Lordships in the *East Riding* case[16] said that it was under paragraph (*a*). Two of them said the notice was a nullity. The words " no such permission was required " gave the

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[10] [1957] A.C. 223.

[11] [1954] 1 W.L.R. 1357.

[12] [1957] 2 Q.B. 564.

[13] A.C. 223.

[14] [1951] 2 Q.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[15] [1958] 1 Q.B. 478; [1957] 3 All E.R. 529.

[16] [1957] A.C. 223.

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justices jurisdiction. The justices must assume that development has taken place, but they need not assume that that development is development for which permission is required. The grounds on which the justices can quash are strictly limited. *Keats'* case[17] is still sound law.

Cur. adv. vult.

LORD GODDARD C.J. This is a special case stated by justices for the county borough of Eastbourne to whom a complaint was preferred under section 23 of the Town and Country Planning Act, 1947, asking for an order to quash or vary an enforcement notice relating to premises at 247, Terminus Road, in the borough. The notice required the removal of an automatic ice-cream sales machine and its attachments from the forecourt of the premises within 21 days after the date on which the notice became effective, which was on the expiration of 28 days from service. The justices held that they had jurisdiction to determine whether or not the matters referred to in the notice constituted development within section 12 (2) of the Act, and determined that they did not.

The only question raised by the case and argued before this court was whether they had this jurisdiction or not. Sections 23 and 24 of this Act have been considered by the courts in a number of cases, all of which have raised questions of difficulty. Indeed in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[1] Lord Simonds referred to the question there in debate as one of exceptional difficulty and it is probable that the last word has not yet been spoken on these sections.

The court is indebted to both counsel for their careful arguments in which all the cases bearing on the point have been examined. Section 23 provides for the enforcement of planning control and enables the authority, if it appears that any development of land has been carried out without permission, to serve on the owner or occupier a notice called an enforcement notice. Subsection (2) provides that the notice shall specify the development which is alleged to have been carried out without permission, or, as the case may be, the matters in respect of which it is alleged that any conditions subject to which permission had been granted had not been complied with. Subsection (4) gives an appeal to a magistrates' court to a person aggrieved by the notice and provides that on any such appeal the court "if satisfied that

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[17] [1954] 1 W.L.R. 1357.

[1] [1957] A.C. 223; [1956] 2 All E.R. 669.

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"permission was granted under this Part of this Act for the "development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may "be, that the conditions subject to which such permission was "granted have been complied with, shall quash the notice to "which the appeal relates."

The question we have to determine depends, in my opinion, on the construction of the words "if satisfied that permission "was granted under this Part of this Act for the development to "which the notice relates, or that no such permission was "required in respect thereof." Is the court to assume that there has been development and to confine themselves to considering whether it is development permitted by the Act without permission, or can they go further and decide that there has not in fact been any development? I propose in the first place to treat this as a matter of construction and then to consider what effect, if any, the cases which have been decided on the section have upon the conclusion to which I have come.

Reading subsections (2) and (4) together, paragraph 4 (*a*) provides that the court, if satisfied that no permission was required for the development which is alleged to have been carried out without the grant of permission, shall quash the notice to which the appeal relates. Now although the powers of the court are limited, as has been pointed out in more than one judgment on this paragraph, in my opinion the court must be entitled to inquire into what the notice describes as development because if it was not development within the Act, it follows that no permission was required. Permission to carry out work is not required if it is one of the operations or uses dealt with in the proviso to section 12. Permission is not required if no material change is made in the use to which buildings or land is being put. If, then, the authority alleged that there had been a material change so that permission was required, the court would, as it seems to me, be bound to consider what the use had been and whether the change alleged by the authority constituted a material change.

In this respect it is important to have regard to section 17 of the Act. This section enables a person who proposes to carry out any operations or make any change in the use of the land to apply to the local planning authority to determine whether what he proposes would constitute or involve development of the land and, if so, whether an application for permission is required. The effect of section 17 (2) is to enable the landowner to appeal to the

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Minister against the determination of the planning authority, and the proviso to that subsection enacts that where it is decided by the Minister that any operations or use would constitute or involve development, his decision shall not be final for the purposes of any appeal to the court under the provisions relating to the enforcement of planning control.

Section 23 (4) does give an appeal against an enforcement order and seems to me to envisage the case where, notwithstanding the decision of the Minister, the landowner carries out that which he proposed and then receives an enforcement order. Notwithstanding the Minister's decision, he is given an appeal to the court and in that case it appears to me that the first question the court would have to decide would be whether the proposed operations or use would constitute or involve development. It may be also they could decide that although it was development, no permission would be required because the work would come within the proviso to subsection (2) of section 12. It follows that, in my opinion, where the court is hearing an appeal under section 23 (4), it has jurisdiction to consider whether the operations or change of use is development or not.

The opinion I have formed does conflict with the decision of this court in *Keats* v. *London County Council.*[2] In that case it was held that the justices had no power to determine whether development had taken place, but only whether permission for the works or use to which the notice referred had been given or was not required, and for the reasons I have just given I think that, in considering whether permission was not required, the justices must be able to determine that it was not required because the works did not constitute development.

It will be observed that section 17 was not called to the attention of the court in *Keats'* case, and that section seems to me to have a most important bearing upon the question we now have to consider. Moreover, when *Keats'* case was cited to this court in *Norris* v. *Edmonton Corporation*[3] the opinion was expressed that the reasoning on which it was based appeared to conflict with that of the House of Lords in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[4] It appeared to the court that their Lordships had decided that justices have jurisdiction to inquire into the facts in order to see whether development had taken place, and in this respect I would call particular attention to the speech of Lord Evershed, Master of the Rolls.[5] Accordingly, I think I am justified in regarding *Keats'* case[6] as one that ought not to be followed and that I am at liberty to hold that the justices did have jurisdiction to consider whether the matter complained of constituted development.

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[2] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[3] [1957] 2 Q.B. 564; [1957] 2 All E.R. 801.

[4] [1957] A.C. 223.

Reluctant as I am to differ from my brethren, who take a contrary view, I feel constrained to maintain my opinion, first, because I think the construction I have placed on these difficult sections avoids the repugnancy to which Donovan J. has referred, and, secondly, because it enables the owner or occupier to challenge the planning authority's opinion otherwise than by inviting them to prosecute him or waiting for them to do so. The decision of the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council*[7] shows that on a prosecution the challenge can be made and must be decided by the justices. The object of section 17 seems to me to enable the owner to obtain a decision without committing what may prove to be a criminal offence. The result, therefore, is that the appeal will be allowed.

HILBERY J. I have the misfortune to differ from my Lord, and need hardly say that I do so with diffidence. But I have finally arrived at the same opinion as my brother Donovan and for the same reasons. As I have had the advantage of reading the judgment he is about to deliver, it is sufficient if I say that I am in complete agreement with it. I would, therefore, allow the appeal.

DONOVAN J. I much regret to find myself differing from the Lord Chief Justice, and I need hardly say that in consequence I regard my own conclusions with misgiving. But though I have searched for the flaw, it still eludes me, and I had better, therefore, state my view at no more length than the subject and the circumstances require.

The Town and Country Planning Act, 1947, defines development as "the carrying out of building, engineering, mining or "other operations in, on, over or under land, or the making of "any material change in the use of any buildings or other land" (section 12 (2)). The Act then proceeds to deal with two kinds of such "development": (1) that for which permission is to be required; (2) that for which permission is not to be required.

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[5] [1957] A.C. 223, 252.

[6] [1954] 1 W.L.R. 1357.

[7] [1958] 1 Q.B. 478; [1957] 3 All E.R. 529.

It also deals with certain operations on, or change of use of, land which are not to be regarded as involving development at all, and are therefore outside the Act altogether. These are set out in the proviso to section 12 (2) and include, for example, works which affect only the interior of a building, or do not materially affect the external appearance. It also follows from the words of the definition that any change in the user of buildings or land which is not a material change is not " development."

In relation to these matters which the Act says are not " development " no question of permission under the Act arises. They are simply not within it. When, therefore, section 23 (4) comes to pose the question: Was permission under this Act required or not? it cannot be referring to these operations, as regards which no question of permission or veto under the Act can arise. The inquiry has reference instead to those operations or change of use which, while still constituting " development " under section 12, may nevertheless be carried out without permission. These include all developments before the appointed day (section 12 (1)), all the changes of use specified in section 12 (5), and the operations described in the proviso to section 12 (3) (*b*).

In these circumstances I think it is inaccurate to speak of permission not being required under the Act on the ground that the particular operation or change of use is not " development." For then, as I say, the question does not arise at all. The phrase is apt only to refer to that which is development but which the Act exempts from the necessity for permission.

Coming now to section 23 (4), it is clear that under its terms justices can do one of four things alone: (*a*) quash the notice if satisfied that permission was granted under Part III of the Act for the development in question; (*b*) quash the notice if satisfied that no such permission was required or that the conditions attached to any such permission have been complied with; (*c*) vary the conditions of the notice if satisfied they are to any extent unnecessary; (*d*) in any other case dismiss the appeal. There is quite clearly within the four corners of section 23 (4) itself no jurisdiction to inquire whether the alleged development has occurred.

The respondents' argument to the contrary, based on the words of section 23 (4), is this: The justices are to quash the notice, inter alia, " if satisfied . . . that no such permission was required in " respect thereof." The words " in respect thereof " relate back to the expression " development " to which the " notice relates," and this in turn means " development which is alleged to have " been carried out without the grant of such permission " required under the Act (see subsections (1) and (2) of section 23). So, it is argued, one is dealing under section 23 (4) simply with "alleged "development," and it must be open to the subject to show that the allegation is unfounded and that therefore no permission is required. But the real allegation is not "development" but "development without the necessary permission," and since some development can be carried out without such permission, full effect can be given to the words in section 23 (4), "if satisfied that such "permission was required," without having to construe them as opening up the whole question whether there was any "development" at all. And, as I have said, where there is no "development," no question of permission or embargo arises. I therefore reject the argument.

Stress, however, is laid upon the language of the proviso to subsection (2) of section 17, already referred to by the Lord Chief Justice, and I agree that this raises a real difficulty. The only appeal to the court referred to in that proviso is the appeal under section 23 (4), first to petty sessions and then to quarter sessions. If the proviso had been limited to a determination by the Minister that permission was required, there would be no conflict with the terms of section 23 (4) at all, because that question is expressly within the jurisdiction of the justices, and they are being told by the proviso not to treat the Minister's decision on that point as final. But they are told the same thing by the proviso in a case where the Minister decides that the prospective operations or use will constitute development of the land. Yet looked at alone, section 23 (4) confers on the justices no jurisdiction to determine this question at all. The problem, therefore, is how to resolve this repugnancy, and there are only two ways of doing it: (1) to construe section 23 (4) as though it conferred the jurisdiction in question because of the language of the proviso; or (2) to treat the language of section 23 (4) as paramount; and the proviso as being, in so far as it contemplates an appeal on the question of development or no development, simply as careless language which is inoperative having regard to the clear terms of section 23 (4) itself. (See hereon Maxwell on Interpretation of Statutes, 10th ed., p. 229.)

I prefer the latter alternative. My reasons are that it is in section 23 (4) that jurisdiction is conferred and delimited; so that to find out the limits of that jurisdiction it is to section 23 (4) that one would naturally turn. It is not to be expected that Parliament would deliberately confer a very wide jurisdiction by a mere proviso in a section dealing with a different matter, and then go on in the section actually conferring jurisdiction carefully to confine it within narrower limits. Moreover, if section 23 (4) is regarded as paramount in this particular respect, the proviso to section 17 (2) does not thereby become empty of content, as I have shown. I think, therefore, that the position must be faced and accepted that in the one respect now under consideration the proviso and section 23 (4) are repugnant provisions; but I think it would do too much violence to the clear language of section 23 (4) to attempt a reconciliation by enlarging the jurisdiction to accord fully with the proviso. If two sections of an Act are repugnant, the general rule is that the last must prevail; and an enacting power cannot as a rule be implied from the language of a proviso. (See upon these matters *Wood* v. *Riley*[8] and *Arnold* v. *Gravesend Corporation*.[9])

A further consideration is this: the Act makes certain elected local authorities the persons who are to plan and control development. By section 5 of the Act these authorities must carry out surveys of their areas and submit to the Minister development plans which may allocate certain areas for agricultural, residential or other purposes. The development plans may be approved by the Minister with or without modifications. Provision is made for the hearing of objections, and local inquiries may be ordered. Unless it is contended by somebody that the plan is invalid under the terms of the Act, it is not open to question in any legal proceedings (section 11 (3)).

If local benches of magistrates, upon whom none of these duties is placed, can override the planning authority upon the question whether something is "development" or not, it is obvious that they can interfere with all development plans, and that a large measure of planning control (as distinct from enforcement) has been placed in their hands. Had this been Parliament's intention, I cannot believe that it would have been effected by a mere proviso in a section dealing with a different subject-matter. I should have expected provisions as clear and explicit as those by which the magistrates' jurisdiction as to enforcement is expressed and limited in section 23 (4). In my respectful opinion, therefore, the decision in *Keats* v. *London County Council*[10] is correct, although no argument on the proviso to section 17 (2) was presented to the court.

In *Norris* v. *Edmonton Corporation*,[11] however, this court said that the decision in *Keats* must be regarded as overruled as being inconsistent with the reasoning of the subsequent decision of the House of Lords in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[12] Counsel for the present appellants, however, contended before us that there was no such inconsistency. It is common ground that in this latter case there was no express disapproval of the decision in *Keats*, which was cited to their Lordships in argument; but the contention of inconsistency is supported by the present respondents in this way: To arrive at its decision the House of Lords in the *East Riding* case had to regard justices as free to go behind the enforcement notice to ascertain whether there had been development within the meaning of the Act of 1947. The justices would then find that there was not because it had all taken place before the appointed day. But this cannot be reconciled with the decision in *Keats* that justices may not go behind the notice to inquire whether there has been "development." If, therefore, they may do this, then they were entitled to do so in the present case, and as a result they found that no development had occurred.

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[8] (1867) L.R. 3 C.P. 26.

[9] (1856) 2 K. & J. 574, 591.

[10] [1954] 1 W.L.R. 1357.

[11] [1957] 2 Q.B. 564.

In the circumstances it is necessary to examine the matter in some detail. The short facts of the *East Riding* case[12] were these: There had, admittedly, been development of the land in question, but it had all been carried out, again admittedly, before the appointed day, namely, July 1, 1948. That being so, while it did not cease to be "development," it was development for which permission was not required under Part III of the Act. (See section 12.) Nevertheless, the East Riding County Council served an enforcement notice upon the occupier stating that this development was "in contravention of planning control" and requiring that it should be discontinued. The occupier made two answers: (1) that the development having been carried out before the appointed day, the justices on appeal to them under section 23 (4) should have quashed the notice in exercise of their express jurisdiction to do so under the subsection in the case of development for which under Part III of the Act no permission was required; (2) that the notice was so defective in form that it was a nullity. The East Riding County Council contended that although the development had taken place before the appointed day, they were nevertheless entitled on the facts to invoke section 75 of the Act of 1947, and therefore treat the development as contravening that Act. As to this, it was held that, not having mentioned section 75 in the notice, they were not entitled to take the point. For the

[12] [1957] A.C. 223.

purposes of the present case that is all that needs to be said about section 75. The county council then disputed, for various reasons, that the notice was a nullity, and into these it is unnecessary for present purposes to go.

On the case made for the occupier, Lords Simonds, Cohen and Evershed agreed that the justices should have quashed the notice on the ground that the development, by reason of its date, required no permission under Part III of the Act. In this respect section 23 (4) confers express jurisdiction upon the magistrates. Lord Simonds also thought that the notice was in any event not a notice on which the county council could rely because of its defects. Lord Morton thought that the notice was a nullity. He doubted whether the justices had power to quash it, but, as the practical effect was the same, concurred in the motion to dismiss the council's appeal. Lord Radcliffe took the same view.

In considering whether the reasoning of their Lordships is inconsistent with the Divisional Court's decision in *Keats*, it may be observed first of all that the question for decision in each case was different. In *Keats* the question was: Can the justices under the terms of section 23 (4) inquire into the question: Has there been development at all? In the *East Riding* case the question was: Did the development, which had admittedly taken place, require any permission under Part III of the Act? Prima facie, therefore, one could answer this second question either way without disturbing the decision in *Keats*.

Next, as to the actual reasoning in the *East Riding* case, Lord Simonds said, adopting what the Lord Chief Justice had said in an earlier case, and applying it to the case under consideration [13]: "The justices, however, had power to quash here because permission under the Act of 1947 was not required in respect of a development which had been carried out before July 1, 1948." Lord Cohen said [14]: "the respondents proved that no such permission was required in respect thereof, i.e., in respect of 'the 'development to which the notice relates.' The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so."

Lord Evershed said [15]: "The words in section 23 (4), 'no such 'permission was required in respect thereof,' are clearly capable of application to any case in which permission was not in truth required under the 1947 Act, whether because the development was of a kind which by the terms of the Act called for no

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[13] [1957] A.C. 223, 236.

[14] Ibid. 247.

[15] Ibid. 252.

"permission or because the development, by reason of the date "when it was carried out, was outside the scope of the Act "altogether. . . . I think the Court of Appeal and the Divisional "Court were right in holding that in the circumstances and upon "its true construction the enforcement notice of April 26, 1951, "ought to have been quashed by the justices."

So far I have not been able myself to find in the reasoning of their Lordships anything inconsistent with the decision in *Keats*. It is true that in his speech Lord Evershed also said[16]: "But "other cases may well arise in which serious questions of fact "might be involved, questions whether in truth the development "had been carried out before the appointed day or whether the "land had in fact ever been used as alleged. If in such cases "it were beyond the jurisdiction of the justices upon an appeal "to determine such questions of fact, then the only course open "to the owner would be to await the taking of further steps by "the authority under section 24 of the Act and then to challenge "the validity of the notice; a course which might well involve "him in a long period of uncertainty and would certainly be "likely to expose him to serious expense. Equally might such "a course of proceedings be an embarrassment to the authority, "who might find, when the facts had turned out ultimately "against them, that it was then too late to exercise their statu-"tory powers and duties at all."

When Lord Evershed uses the words "or whether the land "had in fact ever been used as alleged," he does indeed pose the same kind of question that was answered in *Keats*. But he does not go on to answer it in a sense inconsistent with that decision, or indeed at all. And when reading this passage it is useful to recall his earlier remarks[17]: "It cannot, I think, be doubted that "the terms of section 23 (4) (*a*) and the formulation of the three "grounds upon which a notice under the section may be quashed "assume the premise on which the notice proceeds—namely, that "the matters complained of have been done or undertaken since "July 1, 1948. The relevant words, 'that no such permission was "'required in respect thereof,' according to their more natural "meaning refer to those cases in which, by virtue of section 12 "(5), the development is of the limited character for which "permission is excused. Upon the face of it, the subsection "makes no provision for the case where the development alleged "has not occurred in fact at all."

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[16] [1957] A.C. 223, 252.

[17] Ibid. 251.

With diffidence, therefore, I think the reasoning of the speeches in the *East Riding* case is not inconsistent with the decision in *Keats*; indeed that it harmonizes with it. It is not the case, as counsel for the present respondents suggests, that the House of Lords regarded magistrates as free to go behind the enforcement notice in order to decide whether there had been development or not. But where the question is whether the development took place before the appointed day, magistrates must necessarily inquire into the facts in this respect, for the date of the development will determine whether permission was or was not required under the Act, and this matter is within the jurisdiction expressly conferred upon magistrates under section 23 (4) (*a*). The decision in the *East Riding* case in my view involves no more in this particular direction. At the same time, it is noteworthy that all their Lordships emphasized the strictly confined nature of the jurisdiction conferred on magistrates by section 23 (4).

The question then arises whether the contrary view expressed by this court in *Norris* v. *Edmonton Corporation* [18] still binds us. The decision followed that of this court in *Perrins* v. *Perrins*,[19] and that decision was specifically overruled by the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council*.[20] *Norris* v. *Edmonton Corporation*, therefore, must also be regarded as no longer law. But the Court of Appeal reached its decision on a different ground, involving no necessary conflict with the reason which led the Divisional Court to its decision in the *Norris* case. Nevertheless, now that the decision itself has gone, no useful purpose would, it seems to me, be served by regarding its reasoning as still binding. I agree that it is a peculiar position if the occupier has to wait to be prosecuted before he can challenge the planning authority's view that development has occurred, and that, as the law stands at present, the magistrates will then do under section 24 (3) what they cannot do under section 23 (4), namely, inquire whether development has occurred. But at least that is better for the occupier than nothing at all. And in some cases he may also be able to proceed for a declaratory judgment. However that may be, I think the words of section 23 (4) strictly confine the magistrates' jurisdiction under that subsection to the issues there specified.

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[18] [1957] 2 Q.B. 564.

[19] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[20] [1958] 1 Q.B. 478.

The ultimate result I reach is therefore this: (1) The decision in *Keats* still binds this court. (2) Accordingly, in the present case the magistrates had no jurisdiction under section 23 (4) to consider whether the alleged development had in fact occurred and to decide that it had not. (3) That the appeal must accordingly be allowed, there being no other question before us.

Appeal allowed.
Case remitted to justices with a direction to dismiss the company's appeal against the enforcement notice.
Leave to appeal to the Court of Appeal.

Solicitors: *Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne; Clifford Turner & Co.*

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Mar. 10, 11, 12, 13.

Diplock J.

[1956 A. N. No. 1802. 1957 P. No. 982.]

Conflict of Laws—Foreign legislation—Foreign bank liable on English debt—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank "universal "successor" to rights and liabilities of former banks—Creditors' rights vested in English law—Subsequent foreign amending legislation retrospectively excepting obligation on English debt from universal succession—Whether a law governing succession or status —Whether confiscatory or discriminatory—Right of creditor to sue new bank.

Conflict of Laws—Succession—Corporation—Retrospective foreign legislation—Conflict of Laws—Confiscatory or political legislation. Conflict of Laws—Foreign legislation—Comity.

In 1927 a Greek mortgage bank issued sterling mortgage bonds repayable as to principal in 1957 with interest thereon meanwhile. The bonds were unconditionally guaranteed as to principal and interest by another Greek bank, and the proper law of the bonds and of the ancillary contract of guarantee was English law. In 1953 by an Act of the Government of Greece and by royal decree the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company,

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the defendant company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies. On July 12, 1956, Sellers J. (affirmed by the House of Lords in *National Bank of Greece and Athens S.A.* v. *Metliss* (post)) (proceedings instituted in December, 1955, by a bondholder claiming arrears of interest against the defendants), held that the English courts would give effect to that decree as transferring to the defendants the liabilities of the guarantor bank. On July 16, 1956, the Greek Government passed a legislative decree amending the law and decree of 1953 so that the defendant company, as from the time of its creation, became the universal successor to the rights and obligations of the companies amalgamated "except for the obligation to which such companies were liable "whether as principal or guarantor . . . under bonds payable . . . "in gold or foreign currency, issued by limited liability companies." Under Greek law that decree had a retrospective effect and absolved the defendants from the obligations of the original guarantor bank in respect of the bonds.

On dates subsequent to July 16, 1956, a number of bondholders presented for payment coupons covering certain arrears of interest due under the bonds. Payment was refused by the mortgage bank and by the defendants. In an action by the bondholders against the defendants as guarantors under the bonds in which the defendants relied on the Greek decree of 1956 as a decree governing status which the English courts would recognize and the bondholders contended that that decree was a confiscatory or discriminatory foreign law to which English law would refuse to give effect:—

Held, that the decree of 1956 was not a law of succession or a law relating to capacity or status, but was in substance a law relating to the discharge of liabilities and altered rights which had vested in English law and as such was not, under English rules of private international law, effective to discharge the liability of the defendants to the plaintiffs as guarantors under the bonds.

National Bank of Greece and Athens S.A. v. *Metliss* [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608 and *Lynch* v. *Provisional Government of Paraguay* (1871) L.R. 2 P. & D. 268 considered.

There was no authority which compelled the court to hold that when a sovereign State had created a fictitious person with attributes and capacity to confer rights in English law upon third parties not subject to the jurisdiction of that sovereign State, and such rights had become vested, an English court should give effect to legislation of the sovereign State purporting to annul those vested rights either directly or under the guise of restricting the attributes or capacity of the fictitious person which it had previously created.

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On December 1, 1927, the National Mortgage Bank of Greece issued £2,000,000 7 per cent. sterling mortgage bonds, and the National Bank of Greece unconditionally guaranteed the due payment of the principal moneys and interest and the due performance of all the conditions of the bonds. Both banks were companies incorporated under Greek law. The bonds provided that any question arising thereon should be settled by arbitration in London in accordance with the laws of England, and it was not disputed that the proper law of the bonds and of the ancillary contract of guarantee was English law. On December 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to 4¾ per cent., which modifications were agreed to by the guarantor.

On February 18, 1953, the Greek Government passed a law, Law No. 2292, which authorized the amalgamation or merger of banking companies, and provided, by section 4, that the company which absorbed another company by merger, or the new company formed by the amalgamation, "becomes the universal successor "to the rights and obligations in general of the amalgamated "companies, without any further formality or act whatsoever."

By a royal decree dated February 27, 1953, made under that law the National Bank of Greece and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company, the National Bank of Greece and Athens S.A., the defendant company, was formed; by clause 5 of the decree the National Bank of Greece and the Bank of Athens ceased to exist, and the defendant company was "substituted ipso jure . . . in all "rights and obligations of the said amalgamated banks as their "universal successor." The effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A. as guarantor of the bonds.

By a judgment of Sellers J. on July 12, 1956, affirmed by the House of Lords in *National Bank of Greece and Athens S.A.* v. *Metliss*[1] (in which a bondholder claimed against the defendants for arrears of interest due under the bond), it was held that the English courts would recognize and give effect to the Greek Law No. 2292 and the decree as transferring to the defendants the liabilities of the former National Bank of Greece S.A., and that, accordingly, the defendants were liable to the bondholder under the contract of guarantee.

On July 16, 1956, the Greek Government passed a legislative decree, No. 3504, substituting for the relevant paragraph of article 4 of Law No. 2292 of 1953, as from the time it entered into force, a paragraph whereby the company absorbing another company by amalgamation or the new company formed by the amalgamation became "the universal successor to the rights and obligations of

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[1] [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

"the companies amalgamated, except for the obligations to which "such companies were liable whether as principal or guarantor "or otherwise under bonds, securities in general or contracts "howsoever in relation to loans through bonds payable . . . in "gold or foreign currency, issued by limited liability companies ". . . the new company formed by the amalgamation shall not be "or be deemed by reason of this law or other law or decree or "articles of association . . . to be the successor to the above "obligations under loans in gold or foreign currency . . ." The legislative decree also abolished paragraph 5 of the royal decree of February, 1953, and provided that the rights and obligations of the defendant company were governed as from the time of its creation by the amended provisions of Law No. 2292. In Greek law that decree absolved the defendants from any liabilities as guarantors of the bonds in question, and was a decree to which the Greek courts would give retrospective effect.

On dates subsequent to July 16, 1956, a number of bondholders presented coupons covering interest due under the bonds since January 1, 1950, to the National Mortgage Bank of Greece for payment, and in August and September gave notice thereof to the defendants. Payment was refused by the mortgage bank and by the defendants and on September 17, 1956, and June 4, 1957, the bondholders issued the writs in these actions claiming the arrears of interest against the defendants as guarantors of the bonds.

The defendants contended, inter alia, that the liability alleged against them was governed by Greek law under which, by virtue of the decree Law No. 3504 of 1956, they were not at the material times liable to the plaintiff bondholders under the guarantee. The plaintiffs, in reply, contended that it would be contrary to English public policy to give such or any effect to the Greek Decree Law No. 3504 on the ground that it was confiscatory and discriminatory in that it was enacted for the purpose of depriving a particular class of bondholders of rights of property vested in them immediately before such decree was passed.

The actions were heard together.

John Foster Q.C., *Mark Littman* and *L. J. Blom-Cooper*, for the plaintiffs, referred to *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux.*[2] In *National Bank of Greece and Athens S.A.* v. *Metliss*[3] it was held that the present defendants as the universal successors to the original guarantor were liable to the bondholders under the guarantee. If effect were to be given to the Greek decree, Law 3504 of 1956, that liability would be discharged. Accordingly, that law is a law discharging liabilities; its nature cannot be altered by calling it a law of status, nor should an English court treat it as such.

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[2] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[3] [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

English courts will have regard to foreign laws of succession as at the date of succession only, and any subsequent change in the law of succession of the country of domicile will not be recognized, even when the change is retrospective: *Lynch* v. *Provisional Government of Paraguay*[4] and *In re Aganoor's Trusts*[5]; and see Dicey's Conflict of Laws, 6th ed. (1949), p. 817, r. 178. That rule applies by analogy to the present case; the amalgamation of the original guarantor with the other bank in 1953 and the creation of the defendants as universal successors amounts to the death of one juristic person and the succession of another. The court should have regard to Greek law as it was in 1953 when the succession occurred and not as it was at any later date.

A foreign law which is of a penal nature or which is repugnant to the distinctive policy of English law is disregarded by the English courts: see Cheshire's Private International Law, 5th ed. (1957), pp. 133, 135, 136, 150. Law 3504 comes within both of those categories. A confiscatory law, particularly in time of peace, is penal, and this decree, in that it extinguishes the guarantee, thereby depriving creditors of their cause of action and of any right to future interest, has a confiscatory effect. [Reference was also made to *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*[6] and *In re Claim by Helbert Wagg & Co. Ltd.*[7]]

The decree law is also discriminatory. It is directed against the creditors of the amalgamated banks, and the court is asked to infer from the decree itself, particularly in view of the proceedings in the *Metliss* case,[8] that it is deliberately aimed at those whom it was known would sue on these bonds, namely, the English bondholders.

[DIPLOCK J. Had Law 2292 of 1953 originally been in the form which it has now retrospectively assumed, would the English courts have recognized it?]

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[4] (1871) L.R. 2 P. & D. 268.

[5] (1895) 64 L.J.Ch. 521.

[6] [1935] 1 K.B. 140; 50 T.L.R. 284.

[7] [1956] Ch. 323; [1956] 1 All E.R. 129 (sub nom. *In re Helbert Wagg & Co. Ltd.*).

[8] [1957] 3 W.L.R. 1056.

It would be contrary to the policy of English law to recognize an amalgamation purporting to transfer all the assets of the old companies and not all of their liabilities: *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[9] "Otherwise the transfer of the "assets would very much resemble a fraudulent conveyance": *per* Lord Atkin[10]; and see the observations of Lord Porter.[11] In the present case it is self-evident that that part of the amalgamation which restricted the transfer of liabilities would have amounted to a fraudulent conveyance and be contrary to the policy of English law. Had the decree of 1953 originally been in the form which it has now retrospectively assumed, the English courts would have recognized that part of it which destroyed one company and set up another but would have disregarded that part of it relating to liabilities which would be contrary to English public policy. For cases where English courts have excluded part of foreign legislation (though dealing with another topic), see *Scott* v. *Attorney-General*[12] and *Warter* v. *Warter.*[13] There is no reason why the court should not exclude that part of a foreign law which is contrary to public policy in the same way as it will exclude part of a contract. That principle applies equally where, as here, the foreign law is not contained in one Act or decree; but the present case is even stronger, because there was a time when under Greek law the defendants were liable to the bondholders, and the decree of 1956 purported to take away the bondholders' rights.

T. G. Roche Q.C., *N. H. Lever* and *John Newey* for the defendants. The Greek Law 2292 and the decree of 1953 were legislation relating to succession and giving status: *National Bank of Greece and Athens S.A.* v. *Metliss.*[14] Law No. 3504 of 1956 varied, as the Greek Government had power to do, the incidents of that status; it no more interfered with rights under the original contract than did Law 2292 of 1953: see the *Metliss* case, *per* Viscount Simonds.[15] Law 3504, therefore, is a law of status to which the English courts will give effect.

Legislation may render a contract with a foreign corporation ineffective in two ways: (*a*) by modifying, suspending or discharging the rights thereunder, or (*b*) by creating a situation in which there is no obligor against whom rights which might otherwise have existed can be enforced. With regard to (*a*), the only effective legislation is that of the proper law of the contract: *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*[16]; and see *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux*[17] and *Kahler* v. *Midland Bank Ltd.*[18] (a converse case). But with regard to (*b*), any question regarding the status of a foreign corporation must be determined by the law of the corporation's country of domicile: *Russian and English Bank and Guedalla* v. *Baring Brothers & Co. Ltd.*[19] A law removing a successor is just as much a law of succession as one creating the successor, and although Law 3504 may have the effect of rendering the contract ineffective under (*b*) above, there is nothing in it which takes away rights under the contract itself. The law of 1953 dissolved the National Bank of Greece, created the defendants whom it made successors, and defined the attributes of succession. In the *Metliss* case[20] it was held that that legislation did not have the effect of modifying, suspending or discharging the rights under the contract under (*a*) (supra), but that the law of the domicile of the new company was Greek law and therefore that Greek law was the proper law to decide, not merely whether the new company existed, but also whether it was a successor and what were the attributes of the succession; the House of Lords then considered Greek law as a question of fact and on the evidence found as a fact that at the material times the defendants were successors to all the obligations of the old company and so were liable to the plaintiff in those proceedings. In the present case, therefore, it is not enough for the plaintiffs to prove the bonds and default in payment, but they must also prove that by Greek law the defendants were at the material times successors to the original guarantor and that one of the attributes of their succession was liability under the guarantee. That the plaintiffs have not done, for in Greek law the defendants are not and never have been successors to the liability under the guarantee. The defendants were not a party to the original contract of guarantee and there is no novation, but the plaintiffs' claim rests solely on a Greek decree which at the date when their cause of action arose had been repealed.

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[9] [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549.

[10] [1940] A.C. 1014, 1029.

[11] Ibid. 1050.

[12] (1886) 11 P.D. 128.

[13] (1890) 15 P.D. 152; 6 T.L.R. 391.

[14] [1957] 3 W.L.R. 1056.

[15] Ibid. 1060.

[16] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

[17] 25 Q.B.D. 399.

[18] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

[19] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[20] [1957] 3 W.L.R. 1056.

Law 3504 does not interfere with any rights of property. Before July 16, 1956, the plaintiffs had not a cause of action but a chose in action; they still have that chose in action and such remedies in respect of it as English law gives them; all that Law 3504 of 1956 has done is to take away the statutory right which they previously had under Greek law against the successors to the original guarantor.

The rule that the English courts will only have regard to the law of succession of the country of domicile at the date of the succession has no application to the case of foreign corporations. In *Lynch* v. *Provisional Government of Paraguay* [21] the question was who was to be the administrator, and there is no case where a creditor has in fact sued the heir under foreign law or in which that heir has been held personally liable. Where the law is unsettled, analogy by another branch of the law does not assist.

Had Law 2292 of 1953 originally been in the form which it has now assumed, the English courts would either have held it inapplicable to a contract the proper law of which was English, on the ground that it was a law discharging liabilities, or would have admitted it as a law regulating status. But the law must be regarded as a whole and one part cannot be applied and another part ignored. English courts cannot rectify foreign legislation which they do not like. It makes no difference that here there are in fact two laws, for the whole of the Greek law must be looked at as it was at the material time. The proper test is to ask whether Law 2292 of 1953, as amended, is a law of succession or whether it deals with anything else.

Restrictions against the enforcement of foreign laws on the ground of public policy change from time to time, and today confiscatory foreign legislation is not regarded as immoral in itself. English courts will not enforce decrees that are of a revenue or penal character, but, subject to that, in appropriate circumstances, i.e., if the sphere is one in which it would otherwise be material to give effect to foreign laws, effect will be given to a foreign law notwithstanding that it is confiscatory. The ground of the decision in *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* [22] was not that the law there in question was confiscatory but that it was penal. In *In re Claim by Helbert Wagg & Co. Ltd.*[23] Upjohn J. said that mere confiscation was not a ground for refusing to enforce a foreign law; for the extent to which the propriety of foreign legislation in matters which would otherwise be within the province of the foreign government will be examined, see *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[24]

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[21] L.R. 2 P. & D. 268.

[22] [1935] 1 K.B. 140.

[23] [1956] Ch. 323, 349.

[DIPLOCK J. referred to *Anglo-Iranian Oil Co. Ltd.* v. *Jaffrate.*[25]]

Reliance is not placed on that case but on *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*,[26] in particular *per* Scrutton L.J.[27] [Reference was also made to *Beavan* v. *Lord Hastings.*[28]]

The present is not a case in which the court should inquire into the propriety of the foreign law. If the court does so inquire, then it is the purpose of the law which must be looked at. The purpose of Law 3504 of 1956 was to regulate the status of, inter alios, the defendants. Law 3504 is not a discriminatory but is a general law applying to every bank which was or will be amalgamated under Law 2292 of 1953; it does not apply only to the bonds held by the plaintiffs but to every bond issued or guaranteed by such banks in foreign currency. English law will only treat as discriminatory a law which discriminates against British subjects as such or against a person because he is that person; under this law all bondholders are treated alike. Nor is the law in fact confiscatory. Confiscation means to take away a right of property without payment of compensation. This law takes away no right of property; the plaintiffs' chose in action against the original guarantor ceased in 1953; the statutory right to enforce the debt of the old company against the new company which they were given against the successor is not a chose in action and the removal of that right is not confiscation. The decree is not a penal law. A penal statute is one which has the object of punishing some person; the court is not entitled to speculate as to the motive of a foreign government in passing a decree; if it is not established that the purpose of Law 3504 of 1956 was other than to regulate the economic affairs of Greece, that is sufficient for the defendants' case.

The court must have regard to the direct effect of the foreign law; if it was the indirect effect which had to be considered, the decision in the *Metliss* case[29] would have been different.

John Foster Q.C. in reply. The plaintiffs' claim is not based on a statutory right in Greek law; the Greek law substituted the defendants for the original guarantor and therefore the plaintiffs' claim is one in contract against a person who stands in the shoes of the guarantor.

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[24] [1958] A.C. 301; [1957] 3 All E.R. 286.

[25] [1953] 1 W.L.R. 246.

[26] [1921] 3 K.B. 532; 37 T.L.R. 777.

[27] [1921] 3 K.B. 532, 557–559.

[28] (1856) 2 K. & J. 724.

[29] [1957] 3 W.L.R. 1056.

The defendants' approach to the question of the policy of English law is fallacious. The court must have regard to the fact that the effect of Law 3504 in Greek law is to deprive the plaintiffs of their rights under the guarantee by extinguishing the liability of the new guarantee without reviving the old. A limited universal succession is a contradiction in terms and the decree law is not a law of succession but a law extinguishing liabilities. [Reference was also made to *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[30]] It is admitted that English courts will recognize some foreign confiscatory laws, but in certain circumstances such laws will not be enforced in proceedings in this country. The right approach for the court is to examine the foreign law to ascertain whether or not it is a confiscatory law of the kind which will be recognized: see *In re Claim by Helbert Wagg & Co. Ltd.*[31] In *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford*[32] Devlin J. examined the foreign law. A foreign or governmental act purporting to operate on intangible movables or private proprietary rights outside the jurisdiction of that government will not be recognized if its effect is to deprive a person outside the territorial jurisdiction of the government of a private proprietary right; that principle is stated in *In re Claim by Helbert Wagg & Co. Ltd.*,[33] where the authorities are assembled. [Reference was also made to *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[34] and *Anglo-Iranian Oil Co. Ltd.* v. *Jaffrate.*[35]] Confiscation in English public policy means to deprive some person of property, but it does not necessarily involve that some other person takes the property. A chose in action is a form of property which has situs for the purposes of English private international law, and therefore Law 3504 is confiscatory; it purports to operate on intangible movables in this country in that by removing the link between the Greek persona and the bondholders it destroys the chose in action of the bondholders. Amalgamation and succession are both legal facts or happenings, and any attempt to effect retrospective alterations leads to difficulties and injustice: in this respect reliance is placed on the observation of Lord Penzance in *Lynch* v. *Provisional*

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[30] [1940] A.C. 1014.
[31] [1956] Ch. 323, 351, 352.
[32] [1953] 1 Q.B. 248; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779.
[33] [1956] Ch. 323.
[34] [1921] 3 K.B. 532.
[35] [1953] 1 W.L.R. 246.

Government of Paraguay[36] that "in principle it appears both "inconvenient and unjust"; and see *In re Aganoor's Trusts*.[37] If Law 3504 is not regarded by the English courts as retrospective, it cannot affect succession.

DIPLOCK J. These two actions are brought by the holders of a number of sterling bonds issued by the National Mortgage Bank of Greece against the defendants, as guarantors of the payment of interest under the bonds, for arrears of interest, payment of which was refused on behalf of the principal debtor upon presentation by the plaintiffs of the relative coupons to the agreed paying agents in London upon a date subsequent to July 16, 1956. The bonds are of the same issue as those the subject of the decision in the House of Lords in *National Bank of Greece and Athens S.A.* v. *Metliss*.[1] The original guarantor was another Greek company, the National Bank of Greece S.A.

By a Greek Law, No. 2292 of 1953, and a ministerial decree made pursuant to it dated February 27, 1953, the National Bank of Greece S.A. was amalgamated with another Greek company, the National Bank of Athens S.A., to form a new company, the present defendants. They were created by the Law No. 2292 and the decree itself which at the same time dissolved the two former companies which were so amalgamated. It was held by the House of Lords in the above mentioned decision that the effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A., inter alia, as guarantor of the bonds, and that, as the provision in Law No. 2292 and the decree which had this effect was one which created the defendants and constituted them the "universal successor" of the two dissolved companies, the relevant provision was one which dealt with "succession" or with the "status" of the newly created juristic person and was one to which the English courts would accordingly give effect as transferring to the defendants the liability of the former National Bank of Greece S.A., as guarantor of the bonds, notwithstanding that the proper law of the bonds and of the ancillary contract of guarantee was English law.

It would be open to the defendants to contend upon fresh evidence as to Greek law that Law No. 2292 and the decree in the form in which they were at the time of the *Metliss* case[1]

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[36] L.R. 2 P. & D. 268, 272.

[37] 64 L.J.Ch. 521.

[1] [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

1958

ADAMS
v.
NATIONAL
BANK OF
GREECE AND
ATHENS S.A.
PRUDENTIAL
ASSURANCE
CO. LTD.
v.
SAME.

Diplock J.

did not have in Greek law the effect which the House of Lords found it had. They do not, however, seek to do so, and it is accepted that the House of Lords' findings of fact as to the meaning and effect of Law No. 2292 and the decree in the form in which they were at the relevant date in the *Metliss* case [2] (that is before July 16, 1956) are correct. What the defendants say is that by virtue of a Greek legislative decree, No. 3504, passed on July 16, 1956, which has the same effect as a Greek law, they are absolved from any liability as guarantors of the bonds. The relevant terms of Law No. 2292 and the decree as they existed before July 16, 1956, are set out in the speech of Viscount Simonds in the *Metliss* case.[3] It is only necessary to repeat here for clarity section 4 of Law No. 2292 and clause 5 of the decree, adding that the expert evidence of Greek law called in this case shows that although the Law No. 2292 does not expressly provide that the companies to be amalgamated shall cease to exist upon the amalgamation, clause 5 of the decree was in fact otiose since it only re-states what would in any event have resulted implicitly from Law No. 2292 itself and from general principles of Greek law as a consequence of the amalgamation of the two former companies by ministerial decree.

Section 4 of Law No. 2292 was in the following terms: "No "description of the items contributed is required in the relative "contract of amalgamation nor in the statutes, in the case of "amalgamation by formation of a new company, provided that "all the assets and liabilities of the banking companies amalgamating are contributed as a whole. The company which absorbs "another company by merger, or the new company formed by "the amalgamation, becomes the universal successor to the rights "and obligations in general of the amalgamated companies, without any other formality or act whatsoever."

Clause 5 of the decree read as follows: "As from the publication of the present decree, the National Bank of Greece Ltd. "and the National Bank of Athens, Ltd. cease to exist and the "entire property of each of them in its whole (assets and "liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company by shares, constituted by virtue of these presents, which "is substituted, ipso jure and without any other formality, in "all rights and obligations of the said amalgamated banks, as "their universal successor."

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[2] [1957] 3 W.L.R. 1056.

[3] Ibid. 1058.

The legislative decree passed on July 16, 1956, No. 3504, so far as is relevant reads as follows: " Article 1. The second paragraph of article 4 of Law 2292/1953 ' Concerning the Amalgamation of Limited Liability Banking Companies ' is substituted as from the time it entered into force as follows: ' The company absorbing another company by amalgamation or the new company formed by the amalgamation becomes, without any other formality or act, the universal successor to the rights and obligations of the companies amalgamated, except for the obligations to which such companies were liable whether as principal or guarantor or otherwise under bonds, securities in general or contracts or otherwise howsoever in relation to loans through bonds payable to bearer or not in gold or foreign currency, issued by limited liability companies, public bodies, municipalities and communities, etc.

" ' The company absorbing another company or the new company formed by the amalgamation shall not be or be deemed by reason of this law or other law or decree or articles of association issued pursuant thereto or otherwise howsoever to be the successor to the above obligations under loans in gold or foreign currency until the promulgation of law providing for the extent and the manner of their submission to these obligations.'

" Article 2. Is abolished as from the time of its promulgation paragraph 5 of the sole article of the royal decree of 26/27th February, 1953, ' Concerning the Amalgamation of the National Bank of Greece and the Bank of Athens by the Creation of a New Limited Liability Banking Company.' The rights and obligations of the new limited liability banking company under the name of ' National Bank of Greece and Athens ' created by said decree are governed as from the time of its creation by the relative provisions of Law 2292/1953 as amended by the present law. Article 3. The present enters into force as from its promulgation in the official gazette," and the date is July 16, 1956.

It is established by expert evidence of Greek law that in Greek law this legislative decree absolves the defendants from any liability as guarantors of the bonds which are the subject-matter of this action, and also that the Greek courts (as one would expect) would give retrospective effect to this enactment although it would not have the effect of disturbing any judgment given before July 16, 1956, on the basis of the pre-existing law, nor would the new law be given retrospective effect in any case in which the hearing was concluded before July 16, 1956, even although judgment were given thereafter. The expert witnesses were unable to say positively whether, if the defendants had in fact made a payment (not under a judgment) in satisfaction of a liability from which they were absolved retrospectively by the legislative decree of July 16, 1956, they could recover the amount so paid from the payee. I am not surprised at their inability to answer this question, upon which there must be a dearth of precedent. In the absence of satisfactory evidence that Greek law in this respect differs from English law, I hold (if it be relevant) that if any such payments had been made they would not have been recoverable by the defendants.

It is important to keep in the forefront of one's consideration of the legal problems involved the fact that the defendants were not a party to the contract of guarantee contained in or evidenced by the bonds of which the proper law is English law. The original guarantor was the dissolved company, the National Bank of Greece S.A. There was no novation of the original contract of guarantee. To establish the defendants' liability the plaintiffs must rely upon some provision of Greek law which will be given effect to by the English courts as transferring to the defendants a liability of the dissolved Greek company under a contract of which the proper law is English law.

The defendants' case (if I may put the cart before the horse) is that at the time when the plaintiffs' cause of action arose—that is, after July 16, 1956, when they presented their interest coupons to the paying agents for payment and were not paid—there was in existence no provision of Greek law which transferred to the defendants the liability of the dissolved company as guarantors of the bonds. The plaintiffs, on the other hand, adopt the historical approach. They say that on July 15, 1956, the defendants were liable to the plaintiffs in English law under the guarantee: The House of Lords has so decided. If the defendants have ceased to be liable since that date, but have nevertheless continued to exist as a juristic person, it must be by virtue of a discharge of their contractual liability that is valid in English law, which is the proper law of the contract.

Although the arguments have ranged over a wide field, I think that the case really turns on which of these two rival methods of approach to the defendants' liability is correct. The point is a short one and, like that in the *Metliss* case,[4] is itself devoid of previous authority. It is not, I think, possible to shirk it by holding (as Mr. Foster argued) that even if the original Law No. 2292 and the original decree had been initially in the form which they have now retrospectively assumed, the English court could have applied that part of them which made the defendants the successor of the dissolved National Bank of Greece S.A., and ignored that part which excluded from the succession its liability as guarantor of the bonds. Although the English court can recognize and give effect to the attributes of the new fictitious person given to it by its creator, the Greek Government—since those attributes have in the circumstances in which the defendants were created been held by the House of Lords to be part of its status and governed by the law of its domicile—the English court cannot usurp the function of the creator by bestowing upon it attributes with which its creator has not endowed it. Put bluntly, I do not think that the English court can blow hot and cold.

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[4] [1957] 3 W.L.R. 1056.

Mr. Foster argues that there is a rule of public policy that entitles the English court to blow hot and cold, and permits it to give effect to part of the law, but prevents it from giving effect to that part which is confiscatory and/or discriminatory. That English law will give effect to confiscatory legislation relating to property and rights within the territorial jurisdiction of the legislating State is well established: *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[5]; *Princess Paley Olga* v. *Weisz*[6]; and I agree with Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.*[7] that this is so whether the owners of the property or rights are nationals of or domiciled in the legislating State or not. Mr. Foster contends that as an exception to this rule the courts will not give effect to the confiscatory legislation where it purports to operate upon private proprietary rights outside the jurisdiction of the legislating State. This, I think, may be true of any foreign legislation whether confiscatory or not, but I do not think that the exception would cover Law No. 2292 and the decree if they had originally been made in the form in which they now are. The proprietary rights outside the jurisdiction of Greece were rights against the National Bank of Greece S.A. They were extinguished by the dissolution of that company; but it is conceded that, subject only to its own statutory power to wind up the company in England, the English court must give effect to that dissolution; see *Lazard Brothers & Co.* v. *Midland Bank Ltd.*[8] The existing rights being so extinguished, the real complaint against Law No. 2292 and the decree in their now existing form is that they fail to create new rights against a different guarantor in substitution for rights against the dissolved guarantor.

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[5] [1921] 3 K.B. 532; 37 T.L.R. 777.

[6] [1929] 1 K.B. 718; 45 T.L.R. 365.

[7] [1956] 1 Ch. 323, 348; [1956] 1 All E.R. 129.

I do not see on what principle the English courts can create new rights which the Greek legislature has omitted to do itself. This is something quite different from refusing to recognize the destruction of existing rights. There would be the same fundamental objection in seeking to apply any rule of English law against giving effect to discriminatory legislation. I need not, therefore, embark upon the inquiry whether this rule exists in the form contended for by Mr. Foster, or to what kind of legislation it applies.

In considering and rejecting these two arguments of Mr. Foster I should make it plain that I am expressing no moral judgment one way or the other about the policy or purpose of the Greek Government in passing Law No. 3504 on July 16, 1956. In the view that I take of this case this is irrelevant. The only question I have to determine is, has that law had the effect of relieving the defendants of the liability which lay upon them in English law before the date of Law No. 3504 as guarantors of the bonds held by the plaintiffs? On what I regard as the crucial point in this case I think that the plaintiffs' historical method of approach is the correct one. I ought not to shut my eyes to what has happened even although the Greek courts are by their legislature compelled to do so. The rights which the plaintiffs are seeking to enforce are contractual rights. They are none the less so because the person against whom they seek to enforce them was not originally a party to the contract, but has been substituted as a party by operation of a law (albeit passed by the Greek Government) which the English courts recognize as effective to bring about the substitution. To say that the plaintiffs are seeking to exercise statutory rights arising under a Greek statute, while true in one sense, does not seem to me to be true in the relevant sense of making the proper law of the plaintiffs' rights Greek law—which I apprehend in the case of a Greek statutory right it must be—instead of English law, which is the proper law of the contract. I think that this is also implicit in that part of the House of Lords' decision in the *Metliss* case[9] which rejected the application to a bondholder's rights against the defendants of the Greek laws relating to the moratorium to which effect must have been given if the proper law of the bondholder's rights against the defendants was Greek law.

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[8] [1933] A.C. 289, 297; 49 T.L.R. 94.

[9] [1957] 3 W.L.R. 1056.

Whatever may be the proper method of approach to rights under some other type of contract, it seems to me that in the case of a contract contained in bearer bonds, the benefit of which is transferable by delivery of the bonds, and where individual bondholders may have acquired their rights under the contract at any time since the issue of the bonds in 1927—including the period between the passing of Law No. 2292 and Law No. 3504—it would be quite wrong to approach the legal problem with which I am confronted in this case except on the basis that upon July 15, 1956 (the day before Law No. 3504 was passed), the holder of the bond possessed legally enforceable rights against the defendants as guarantor under a contract of which the proper law is English law. It is, therefore, I think, for the defendants to show that their liability which existed on July 15, 1956, has been discharged.

They rely upon Law No. 3504. I have to look at the substance of the law, not merely at its form. If it is a law which in substance merely discharges as from July 16 the liability of (inter alios) the defendants from liabilities which include (inter alia) liabilities under the contract of guarantee contained in the bonds whose proper law is English, it is in my view beyond question that an English court will not treat it as effective to do so so far as the liabilities under a contract whose proper law is English law are concerned. I have deliberately inserted the latin parentheses to make it clear that my judgment is in no way dependent on any inference that Law No. 3504 was specifically directed against the holders of this issue of bonds, although I should have drawn that inference if the matter were relevant.

The discharge of contractual liabilities of banks in the position of the defendants is obviously one of the objects which Law No. 3504 is seeking to achieve. Is it saved from being in substance a law discharging contractual liabilities, and brought into the category of a law of succession because it purports to achieve that object by amending a pre-existing law of succession? I think that the short answer to that is that a law which alters the rights and liabilities of persons who are already successors, although it may be a law relating to "successors," is not a law of succession at all. A law of succession deals with what happens to the rights and liabilities of a natural person upon his decease, or in the case of a company upon its ceasing to exist. A law which deals with the existing rights and liabilities of a person, not upon his decease, but upon some other date or event, does not become a law of succession merely because, as a matter of history, those rights and liabilities originally vested in him as the result of a law of succession. In my view, therefore, Law No. 3504 is not a law of succession, but a law which discharges contractual liabilities.

Mr. Foster, while arguing (in my view correctly) that Law No. 3504 was not a law of succession, relied upon an alternative argument that in any event it should be ignored because, for the purpose of probate and administration, the English courts only recognized the laws of succession in force in the country of the deceased's domicile at the date of his death. The rule is so stated in Dicey's Conflict of Laws, 6th ed. (1949), p. 817, and is supported by *Lynch* v. *Provisional Government of Paraguay*[10] and *In re Aganoor's Trusts*.[11] This rule, Mr. Foster urged, should be applied by analogy to the case of succession of fictitious persons which ceased to exist on amalgamation. Although Lord Penzance in *Lynch's* case,[12] when applying the rule to a grant of probate, appears to have based it as much on convenience as anything else, I think that probably the true basis is that which I have expressed above, namely, that a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognize as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased.

This branch of the case has been argued principally on the basis that the question whether the English court would give effect to Law No. 3504 depended upon whether it was a law of succession; but although this was the ground upon which the Court of Appeal[13] and the minority of the House of Lords[14] (Lord Morton of Henryton and Lord Keith) decided that effect should be given to Law 2292, the majority of the House of Lords (Lords Simonds, Tucker and Somervell of Harrow) appear to have based their decision upon the ground that comity which requires us to recognize the existence of a fictitious person created by another sovereign State requires us to recognize also the attributes with which it has been created, for those can properly be regarded as a matter pertaining to its "status," which is governed by the law of the country which created it. But there is no authority which compels me to hold that when a sovereign State has created a fictitious person with attributes and capacity to confer rights in English law upon third parties not subject to the jurisdiction of that sovereign State, and such rights have become vested in such third parties, an English court should give effect to legislation of that sovereign State which purports to annul those vested rights in English law, either directly or under the guise of restricting the attributes or capacity of the fictitious person which it has previously created.

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[10] (1871) L.R. 2 P. & D. 268.

[11] (1895) 64 L.J.Ch. 521.

[12] L.R. 2 P. & D. 268, 272.

[13] [1957] 2 Q.B. 33; [1957] 2 All E.R. 1 (sub nom. *Metliss* v. *National Bank of Greece and Athens S.A.*).

[14] [1957] 3 W.L.R. 1056.

I think that the matter can be tested quite simply. If the Greek legislature in 1952 had passed a law saying that the National Bank of Greece S.A. had not the capacity to pay the interest on this issue of bonds, or any particular class of bonds which it had already issued, or that it was ultra vires for them to do so, would the English court have given effect to such a law? The answer is, I think, plainly No. The reason being that such a law is not in substance a law relating to capacity or " status "; it is a law discharging a liability.

Finally, I have to consider whether—even although Law No. 3504 might have been ineffective to discharge the defendants' liability which existed on July 15, 1956, had it purported to do so as from the date of the law coming into force—its retrospective character converts it into a law of succession or status, and thus one to which an English court should give effect. No doubt when the British Parliament passes a retrospective law and tells a statutory lie (which it may do for the best possible motives), the English law has got to pretend to believe it. But if I am right in thinking that a law which alters the rights and liabilities of persons who are already successors is not a law of succession, it does not become so because it says untruthfully that they never were successors at all. So also, if a Greek law which purported to deprive a fictitious person created by Greek law of the capacity to fulfil an obligation which it had validly incurred would be treated by the English court as a law discharging a liability, and not as a law relating to capacity or " status," I do not see how its substance is changed merely because it purports to say untruthfully that the fictitious person never had the capacity to incur the liability.

In my view, Law No. 3504 of July 16, 1956, was not a law of succession or relating to capacity or " status," but was in substance a law relating to the discharge of liabilities, and as such it is not, under English rules of private international law, effective to discharge the liability of the defendants as guarantors

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of the bonds held by the plaintiffs, which I am bound by the decision of the House of Lords in the *Metliss* case[15] to hold existed on July 15, 1956, before Law No. 3504 was passed.

This action, therefore, succeeds.

Judgment for the plaintiffs.

Solicitors: *Herbert Smith & Co.; Stibbard, Gibson & Co.*

J. F. L.

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[15] [1957] 3 W.L.R. 1056, 1057.

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Jan. 28,
29, 30, 31;
Feb. 3,
4, 18.

McNair J.

HARVEY *v.* R. G. O'DELL LTD. AND ANOTHER. GALWAY (THIRD PARTY).

[1954 H. No. 1206.]

Vicarious Liability — Master and servant — Negligence — Course of employment—Injury to servant through negligence of fellow-servant — Motor-cycle belonging to fellow-servant authorized and only practical method of transport—Accident while travelling for meal —Whether journey in course of employment.

Vicarious Liability—Master and servant—Indemnity from servant—Injury to fellow-servant by negligent driving of servant employed as storekeeper—Motor-cycle combination belonging to storekeeper made available for employers' business—Whether implied term to drive with reasonable skill and care in storekeeper's contract of employment.

Joint Tortfeasor—Contribution—Limitation of action—Action against one tortfeasor statute barred—Any tortfeasor "who . . . would if "sued have been liable"—Injury to fellow-servant by negligent driving of servant—Servant killed in accident—No proceedings brought within six months of taking out representation—Whether claim for contribution between tortfeasors "in respect of a cause of "action in tort"—Whether claim to contribution survived against estate of deceased tortfeasor—Whether deceased a tortfeasor "who ". . . would if sued have been liable"—"if sued"—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 *—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*).

Joint Tortfeasor—Contribution—Death of one tortfeasor.

On February 29, 1952, the plaintiff, a workman employed by the defendants, a firm of builders and repairers in London, and G., a fellow employee, were engaged on repair work on the defendants' behalf at Hurley. G., who was employed as a storekeeper, owned a motor-cycle combination which he used from time to time for the defendants' business; he paid for his petrol, but when out on the defendants' business received a travel allowance based on the cost of public transport. When engaged on outside work the defendants' workmen were paid for travelling time as working time and, if they were out all day and had to travel some distance to get a meal, were paid for the time taken in travelling to and from the meal place as working time. When instructed to go to Hurley G. had been told to take the plaintiff with him as his mate in his sidecar. It would not have been possible for G. and the plaintiff to travel to Hurley and back by public transport and to complete the work there in one day. G. had taken some tools from the defendants' yard with him, but after he and the plaintiff had been working for some hours they went into Maidenhead, a distance of about five miles, where G. procured further tools and materials and they both had a meal. On the way back to Hurley when the plaintiff was a passenger in the sidecar the motor-cycle combination came into collision with a car and the plaintiff received injuries and G. was killed. The accident was due, in part at least, to the negligence of G. In an action by the plaintiff for damages on the ground that the defendants were vicariously liable for G.'s negligence, the defendants contended that at the time of the accident neither G. nor the plaintiff was acting in the course of his employment:—

Held, that G. was acting in the course of his employment in using his motor-cycle combination, the authorized and only practical method of conveyance for himself and the plaintiff, for the journey from London to Hurley, and that, in the circumstances, the journey from Hurley to Maidenhead and back, even if no question of tools had arisen and its main purpose had been to get a meal, was fairly incidental to the work which they had been instructed to do, and was within the scope of their employment; accordingly, the defendants were vicariously liable for G.'s negligent method of performing that journey.

Canadian Pacific Railway Co. v. *Lockhart* [1942] A.C. 591; [1942] 2 All E.R. 462 and *McKean* v. *Raynor Brothers Ltd.* (*Nottingham*) [1942] 2 All E.R. 650 applied.

On May 24, 1952, letters of administration of the estate of G. were granted to his widow. In third party proceedings against the widow as administratrix instituted by the defendants on March 14, 1955, claiming damages for breach by G. of his contract of employment and contribution under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935,[1] in which

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[1] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1): "Where damage is suffered by any "person as a result of a tort . . . "(*c*) any tort-feasor liable in respect "of that damage may recover con-"tribution from any other tort-feasor "who is, or would if sued have "been, liable in respect of the same "damage, whether as a joint tort-"feasor or otherwise, . . ."

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the widow contended, inter alia, that the defendants' rights were barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934 [2]:—

Held, (1) that G. had been engaged and employed by the defendants as a storekeeper and not as a driver, and that the fact that he had made his motor-cycle combination available for his employers and was acting in the course of his employment did not mean that there must be implied into his contract of employment a term that he would use reasonable skill and care in driving, or that he had impliedly agreed to indemnify his employers against liability arising from his negligent driving; the defendants, therefore, were not entitled to claim against his estate for damages for breach of contract.

Lister v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555; [1957] 1 All E.R. 125 distinguished.

(2) That since the right to contribution between tortfeasors was a right sui generis conferred by statute, proceedings for contribution under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, were not "proceedings . . . "in respect of a cause of action in tort" within the meaning of section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934; that, although the cause of action for contribution under the Act of 1935 did not arise until the time of judgment in the action, by virtue of section 1 (4) of the Act of 1934 it was to be deemed to have been a cause of action subsisting against G. before his death; and that, therefore, the defendants' claim under the Act of 1935 was not barred by section 1 (3) of the Act of 1934.

Littlewood v. *George Wimpey & Co. Ltd. and B.O.A.C.* [1953] 2 Q.B. 501; [1953] 2 All E.R. 915; *George Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169; [1954] 3 All E.R. 661 and *Post Office* v. *Official Solicitor* [1951] 1 T.L.R. 333; [1951] 1 All E.R. 522 applied.

Alternatively that section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, was not by its terms comprehensive and the present claim for contribution survived against the administratrix like any other claim not expressly dealt with by the section.

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[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1: "(1) "Subject to the provisions of this "section, on the death of any person ". . . all causes of action subsisting "against or vested in him shall sur"vive against, or, as the case may "be, for the benefit of, his estate. ". . . (3) No proceedings shall be "maintainable in respect of a cause "of action in tort which by virtue "of this section has survived against "the estate of a deceased person, "unless either—. . . (*b*) the cause of "action arose not earlier than six "months before his death and pro"ceedings are taken in respect there"of not later than six months after "his personal representative took out "representation. (4) Where damage "has been suffered by reason of any "act or omission in respect of which "a cause of action would have sub"sisted against any person if that "person had not died before or at "the same time as the damage was "suffered, there shall be deemed, for "the purposes of this Act, to have "been subsisting against him before "his death such cause of action in "respect of that act or omission as "would have subsisted if he had died "after the damage was suffered."

(3) That on the construction of section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the phrase "who . . . would if sued have been liable" contained no temporal connotation, other than that the hypothetical action contemplated had been instituted at some time before the claim for contribution arose, and meant "who, if sued at any time, would "have been liable." G., therefore, was a "tortfeasor who . . . "would if sued have been liable" within the meaning of section 6 (1) (*c*) and, accordingly, his administratrix was liable to indemnify the defendants in respect of their liability to the plaintiff.

Morgan v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.* [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328 applied.

George Wimpey & Co. Ltd. v. *B.O.A.C.* [1955] A.C. 169 considered.

ACTION.

The plaintiff, Leonard Harvey, was at all material times employed at their Battersea yard by the first defendants, R. G. O'Dell Ltd., a company carrying on business as barge builders and repairers who also undertook general repair work. On February 28, 1952, the second defendant, William George Hudson, the manager of the defendant company, asked one Galway, a storekeeper employed by the company, to go to Hurley on the following morning to repair a fence round a caravan belonging to his (Hudson's) sister. Galway owned a motor-cycle and sidecar which he used for the journey between his home and the yard and which he also used from time to time for collecting stores for the company and on occasion for travelling to and from outside repairing jobs; when out on the company's business he paid for his own petrol but was entitled to a travelling allowance based on the cost of public transport. It would not have been possible to go to Hurley and back by public transport and complete the work there in one day, and Galway was chosen to go because he was the most suitable man available and because he had a motor-cycle and sidecar. Hudson told Galway that he could take the plaintiff in his sidecar as his mate. Galway agreed to go to Hurley and arranged to meet the plaintiff at the yard early next morning, telling him that they would be out all day and would get dinner out.

On the following morning, February 29, 1952, Galway and the plaintiff went to Hurley in Galway's motor-cycle combination, taking some tools with them. After they had worked on the fence for some hours they went into Maidenhead, a distance of about five miles, where Galway procured further tools and materials and they both had coffee and sandwiches. They finished their meal and were returning to Hurley when the motor-cycle combination came into collision with a motor-car and the plaintiff received injuries and Galway was killed.

The plaintiff took no proceedings against the estate of Galway, but he sued both defendants for damages for the injuries and loss he had suffered as a result of the accident, which he alleged occurred in the course of his employment and was due to the negligence of Galway, their servant or agent, in the driving, management and control of the motor-cycle combination, alleging also, against the second defendant, breach of warranty of authority. The defendants, inter alia, denied that at the time of the accident either Galway or the plaintiff was acting in the course of his employment.

On May 24, 1952, letters of administration of the estate of Galway were granted to his widow (now Mrs. Doye). On March 14, 1955, the first defendants issued a third party notice against the widow, as administratrix of the estate of Galway, claiming that if they should be held liable to the plaintiff they were entitled to recover from her contribution under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, on the ground that Galway was a tortfeasor who would if sued have been liable in respect of the damage alleged to have been suffered by the plaintiff; alternatively, they alleged that it was a term of Galway's contract of employment, or a duty owed by him as a servant to them as masters, that he would so conduct himself as not by negligence on his part to impose liability on them, and they claimed damages for breach of contract, alternatively, an indemnity. Similar third party proceedings were subsequently instituted by the second defendant.

The third party denied liability and contended, inter alia, that the defendants' alleged rights of action, in that they were not pending against Galway at the time of his death, nor taken within six months of representation being taken out, were barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934.

The facts are more fully stated in the judgment.

Gerald Gardiner Q.C. and *J. R. Elson Rees* for the plaintiff. The use by Galway of his motor-cycle combination on the journey from Hurley to Maidenhead and back arose out of and was in the course of his employment (*Canadian Pacific Railway Co.* v. *Lockhart*[3]), and the defendants, therefore, are liable for the damage caused by his negligent driving. That is so even if the sole purpose of the journey was to get a meal; since Galway and the plaintiff were out on an all-day job and no meal was provided on the site the journey was part of the day's work and not an interruption in their employment: see *Martin* v. *J. Lovibond & Sons Ltd.*[4] There is no difference in principle between the common law decisions on this topic and those under the repealed Workmen's Compensation Acts, where the test was whether the act in question was for the benefit of the employers. [Reference was also made to *Edwards* v. *Wingham Agricultural Implement Co. Ltd.*[5]; *John Stewart & Son (1912) Ltd.* v. *Longhurst*[6]; *Sir W. G. Armstrong, Whitworth & Co. Ltd.* v. *Redford*[7]; *Knight* v. *Howard Wall Ltd.*[8]; *Cook* v. *Gateshead Corporation*[9]; *Higbid* v. *R. C. Hammett Ltd.*,[10] and *McKean* v. *Raynor Brothers Ltd. (Nottingham).*[11]]

Stephen Chapman Q.C. and *Gordon Friend* for the defendants. At the time of the accident Galway was not acting in the course of his employment, and no liability in respect of his negligence attaches to the defendants. Decisions under the Workmen's Compensation Acts have been used as authorities on when a workman is acting in the course of his employment at common law: see *Staton* v. *National Coal Board.*[12] If a workman is not acting "in the course of the employment," within the ordinary English language of the Workmen's Compensation Acts, he cannot be acting within the authority of his employment at common law. But a workman acting in the *course* of his employment may nevertheless not be acting within the *scope* of his employment: see *Edwards* v. *Wingham Agricultural Implement Co. Ltd.*[13] Nor, because he is acting in the course of his employment is he necessarily acting within the scope of his employment for the purpose of attaching vicarious liability to his employer. It is submitted that the test for the latter purpose is not so wide as the test applied in the decisions under the Workmen's

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[3] [1942] A.C. 591; [1942] 2 All E.R. 462.

[4] [1914] 2 K.B. 227.

[5] [1913] 3 K.B. 596.

[6] [1917] A.C. 249; 33 T.L.R. 285.

[7] [1920] A.C. 757; 36 T.L.R. 451.

[8] (1938) 55 T.L.R. 227; [1938] 4 All E.R. 667.

[9] (1944) 37 B.W.C.C. 106.

[10] (1932) 49 T.L.R. 104.

[11] [1942] 2 All E.R. 650.

[12] [1957] 1 W.L.R. 893; [1957] 2 All E.R. 667.

[13] [1913] 3 K.B. 596.

Compensation Acts. In *Canadian Pacific Railway Co.* v. *Lockhart* [14] the workman was at all times engaged in work which he was obliged to do by the terms of his employment, and all that was suggested by the defendants was that he had put himself outside the scope of his authority by committing a breach of an express rule which he was required to obey. In the present case the question is not whether Galway was doing what he was employed to do in an improper fashion, but whether at the material time he was doing anything at all for his employers.

A journey to and from work is not in the course of a workman's employment even if he uses transport contemplated or provided by the employer unless there is an obligation to use that transport: *St. Helens Colliery Co. Ltd.* v. *Hewitson* [15]; the employment does not start until the place where he is required to work has been reached: see Willis's Workmen's Compensation Acts, 37th ed. (1945), pp. 24 et seq., and *Netherton* v. *Coles.*[16] It is therefore immaterial that it was contemplated that Galway and the plaintiff would go to Hurley in Galway's motor-cycle combination, and the questions whether and where they agreed to meet are irrelevant; the fact that they were paid travelling allowance in respect of that journey is also irrelevant: *Netherton* v. *Coles.*[16] The same principles apply to the journey from Hurley to Maidenhead and back, and that journey was not ancillary or incidental to Galway's employment. The "lunch hour" decisions cited in support of the plaintiffs' case depend upon the principle that a workman whose presence on his employers' premises is an incident of his employment is exposed to the risks of the premises: see the judgment of Lord Atkinson in *St. Helens Colliery Co. Ltd.* v. *Hewitson.*[17] A workman's lunch hour is not ancillary or incidental to his employment, and reliance is placed on the observations of Lord Sumner in *Sir W. G. Armstrong, Whitworth & Co. Ltd.* v. *Redford.*[18] The employer has no authority or power to tell a workman what to do during the lunch hour, but the workman is free to choose to stay on the site or to travel some distance away; what he chooses to do is no concern of the employer: *Higbid* v. *R. C. Hammett Ltd.*[19] *Martin* v. *J. Lovibond & Sons Ltd.*[20] was not a lunch-hour case; there the workman's sphere of work was the highway and it was specifically stated by Cozens Hardy M.R.[21] that there had been no break in the course of his employment. Even if the dominant purpose of the journey to Maidenhead and back was to obtain tools, that is insufficient to make it a journey in the course of Galway's employment. [Reference was also made to *Parker* v. *Owners of Ship Black Rock*[22]; *Gilbert* v. *Owners of Steam Trawler Nizam*[23]; *Poulton* v. *Kelsall*[24]; *Charles R. Davidson & Co.* v. *M'Robb or Officer*[25]; *John Stewart & Son (1912) Ltd.* v. *Longhurst*[26]; *Knight* v. *Howard Wall Ltd.*[27]; *Crook* v. *Derbyshire Stone Ltd.*[28]; *Cook* v. *Gateshead Corporation*[29]; *Alderman* v. *Great Western Railway Co.*,[30] and *Blee* v. *London and North Eastern Railway Co.*[31]]

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[14] [1942] A.C. 591.

[15] [1924] A.C. 59; 40 T.L.R. 125.

[16] [1945] 1 All E.R. 227.

[17] [1924] A.C. 59, 68.

[18] [1920] A.C. 757, 773; 36 T.L.R. 451.

[19] 49 T.L.R. 104.

[20] [1914] 2 K.B. 227.

[21] Ibid. 230.

Harold Marnham for the third party. At the time of the accident Galway was not in the employment of the defendant company; the work at Hurley was not being done for their benefit. Hudson's sister did not intend to employ the company, and there was never any intention that the company should receive payment for the work done. Nor was Galway in the employment of Hudson at the material time. His position was more akin to that of an independent contractor or a volunteer than that of an employee. Neither the company nor Hudson had any control over the way in which the work was done.

Gerald Gardiner Q.C. in reply. Hudson had actual and ostensible authority to instruct Galway as he did, and Galway was acting in the course of his employment on the day in question. Moreover, both he and the plaintiff were being paid for that day's work by the defendant company. Galway was using his motor-cycle combination, which was the only practical method of transport, at the defendants' request and on their business, and the position in law is the same as if he had gone to fetch the plaintiff from the café in the defendant company's van: *Canadian Pacific Railway Co.* v. *Lockhart*[32] and *McKean* v. *Raynor Brothers Ltd. (Nottingham)*.[33] The defendants are therefore liable unless Galway was on a frolic of his own. It has not been suggested that Galway did anything improper or was acting contrary to instructions in going to Maidenhead. [Reference was also made to *Whatman* v. *Pearson*.[34]] The whole conduct of the day's operations had been left to him; he and the plaintiff were out on an all-day job and it was reasonable for him to go into Maidenhead and to take the plaintiff with him. An employee may be authorized to do acts which under the terms of his employment he is not obliged to do: *Poland* v. *John Parr & Sons*.[35]

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[22] [1914] 2 K.B. 39; 30 T.L.R. 271; [1915] A.C. 725; 31 T.L.R. 432.

[23] [1910] 2 K.B. 555; 26 T.L.R. 604.

[24] [1912] 2 K.B. 131; 28 T.L.R. 329.

[25] [1918] A.C. 304; 34 T.L.R. 213.

[26] [1917] A.C. 249.

[27] 55 T.L.R. 227; [1938] 4 All E.R. 667.

[28] [1956] 1 W.L.R. 432; [1956] 2 All E.R. 447.

[29] 37 B.W.C.C. 106.

[30] [1937] A.C. 454; 53 T.L.R. 594; [1937] 2 All E.R. 408.

[31] [1938] A.C. 126; 54 T.L.R. 71; [1937] 4 All E.R. 270.

[32] [1942] A.C. 591.

[33] [1942] 2 All E.R. 650.

Whether "work" includes travel depends on the nature of the "work" or employment, and is a question of common sense: contrast, for example, a commercial traveller who is working when travelling just as much as when he is selling, or a plumber going from house to house to carry out repairs, with a clerk employed to work in an office. The workman in *Netherton* v. *Coles* [36] was employed to do work at a certain place, whereas in *Canadian Pacific Railway Co.* v. *Lockhart* [37] the workman was employed to travel to and do an outside job, as was Galway in this case. The test is whether what the workman was doing was what he was employed to do or was incidental or ancillary to what he was employed to do. *St. Helens Colliery Co. Ltd.* v. *Hewitson* [38] must be read in the light of *Weaver* v. *Tredegar Iron and Coal Co. Ltd.*,[39] in particular the observations of Lord Atkin [40] and Lord Porter,[41] but it is submitted that the colliery cases are in a category of their own. The decisions in the "lunch "hour" cases show that there is a distinction between cases where an employee is on the employer's premises and "outside" cases, but each case depends on its particular facts: for a very similar case to this, see *British Transport Commission* v. *Ministry of Supply*.[42] [Reference was also made to *John Stewart & Son (1912) Ltd.* v. *Longhurst* [43]; *Sir W. G. Armstrong, Whitworth & Co. Ltd.* v. *Redford* [44]; *Gilbert* v. *Owners of Steam Trawler Nizam* [45]; *Poulton* v. *Kelsall* [46]; *Parker* v. *Owners of Ship Black Rock* [47]; *Charles R. Davidson & Co.* v. *M'Robb or Officer* [48]; *Crook* v. *Derbyshire Stone Ltd.*,[49] and *Cook* v. *Gateshead Corporation*.[50]] In the circumstances of this case it is submitted that the journey from Hurley to Maidenhead and back was incidental to the employment of Galway, even if the purpose of the journey was only to get lunch.

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[34] (1868) L.R. 3 C.P. 422.

[35] [1927] 1 K.B. 236.

[36] [1945] 1 All E.R. 227.

[37] [1942] A.C. 591.

[38] [1924] A.C. 59.

[39] [1940] A.C. 955; 56 T.L.R. 813; [1940] 3 All E.R. 157.

[40] [1940] A.C. 955, 971.

[41] Ibid. 992.

[42] June 25, 1956 (unreported). Bingham Motor Claims Cases [Supplement to 3rd ed. (1956) A. 8]; The Times, June 26, 1956, p. 6b; sub nom. *Road Haulage Executive* v. *Ministry of Supply*.

[43] [1917] A.C. 249.

[44] [1920] A.C. 757.

[45] [1910] 2 K.B. 555.

[46] [1912] 2 K.B. 131.

[47] [1914] 2 K.B. 39.

[48] [1918] A.C. 304.

[49] [1956] 1 W.L.R. 432.

[50] 37 B.W.C.C. 106.

Stephen Chapman Q.C. and *Gordon Friend* for the defendants in the third party proceedings. If Galway in driving his motor-cycle at the time of the accident was acting in the course of his employment so as to render the defendants vicariously liable for the damage resulting from his negligence, then, on the basis of the decision in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*,[51] the defendants would have had a cause of action in contract against Galway, had he been alive, in respect of the loss and expense imposed on them by his negligence. When any person undertakes to do any work in the capacity of a servant he impliedly warrants that he has the necessary skill to do the work and that he will do it throughout with proper care, and a term that the servant will indemnify his employer in respect of liability which the employer would not have incurred but for the servant's lack of care is implied into a contract of employment as a matter of law: see the judgment of Willes J. in *Harmer* v. *Cornelius*[52]; the implication of such a term is inherent in the relationship of master and servant, and it must follow that the term is implied in relation to whatever work the servant undertakes to do: in this respect reliance is placed on the views expressed by Viscount Simonds in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[53] It is submitted that the principle laid down in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[53] is not qualified, but is of general application, and that it makes no difference that Galway was employed as a storekeeper and not as a driver. In driving his motor-cycle at the time of the accident he was either acting within the scope of his employment or not; if he was, then the same warranty is to be implied as in the case of a servant engaged as a driver, and he was under a contractual duty to drive with care. [Reference was also made to *Izzard* v. *Universal Insurance Co. Ltd.*[54]]

The defendants' cause of action against Galway for breach of implied warranty is founded upon an obligation under a contract and might have been enforced against him by suing him during his lifetime; it is therefore enforceable under the general rule which, it is submitted, is correctly set out in Halsbury's Laws of England, 3rd ed. (1956), vol. 16, p. 465, para. 931. If Galway was killed instantly, the breach of duty was simultaneous with his death and the cause of action was subsisting against him at his death. In *Batthyany* v. *Walford* [55] a liability arising at the moment of death gave the plaintiff a right against the estate of the deceased person; it is interesting to compare the statutory obligation in Austrian law under which the liability arose in that case with the English statutory obligation to provide indemnity under section 36 (1) (*b*) of the Road Traffic Act, 1930.

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[51] [1956] 2 Q.B. 180; [1955] 3 All E.R. 460; [1957] A.C. 555; [1957] 1 All E.R. 125.

[52] (1858) 5 C.B.N.S. 236, 246.

[53] [1957] A.C. 555, 572, 573.

[54] [1937] A.C. 773; 53 T.L.R. 799; [1937] 3 All E.R. 79.

Section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, does not bar the defendants' claim under this head. The subsection applies only to causes of action in tort; it does not affect the common law rule that actions arising out of a contract entered into by the deceased person may be maintained against his estate. The legislature was concerned to enlarge the class of action which might be brought against personal representatives: compare the language of section 26 (5) of the Administration of Estates Act, 1925; and the effect of section 1 (3) is to qualify subsection (1) so that if a cause of action which survives against the estate of a deceased person by virtue of subsection (1) is a cause of action in tort, proceedings in respect of that cause of action are subject to the restrictions in subsection (3).

Nor are the proceedings for contribution under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, proceedings "in respect of a cause of action in tort" within the meaning of section 1 (3) of the Act of 1934. The right to contribution under section 6 (1) (*c*) of the Act of 1935 is sui generis and does not give rise to a cause of action in tort. The right is a special statutory right created by the Act similar in nature to the right under section 30 (2) of the Workmen's Compensation Act, 1925, which Barry J. analysed in *Post Office* v. *Official Solicitor* [56] and said [57] was "clearly not a claim in tort." In *Littlewood* v. *George Wimpey & Co. Ltd. and B.O.A.C.*[58] all the members of the Court of Appeal agreed that the right to contribution under the Act of 1935 was a creature of statute. The members of that court were also in agreement that the cause of action for contribution arose at the date of the judgment against the party claiming contribution: see also *George Wimpey & Co. Ltd.* v. *B.O.A.C.*,[59] *per* Lord Tucker [60] and Lord Keith of Avonholm.[61] Under section 1 (4) of the Act of 1934 the cause of action for contribution must be deemed for the purposes of that Act to have been subsisting against Galway before his death; accordingly it survives against his estate by virtue of subsection (1): *Post Office* v. *Official Solicitor*.[62]

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[55] (1887) 36 Ch.D. 269.

[56] [1951] 1 T.L.R. 333; [1951] 1 All E.R. 522.

[57] [1951] 1 All E.R. 522, 527.

[58] [1953] 2 Q.B. 501; [1953] 2 All E.R. 915.

[59] [1955] A.C. 169; [1954] 3 All E.R. 661.

[60] [1955] A.C. 169, 192.

The words "any other tortfeasor" in section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, are wide enough to include the estate of a deceased tortfeasor, and it is submitted that section 6 (1) (*c*) contains no temporal connotation in relation to the time when the hypothetical action contemplated by the section must be assumed to have been brought, and therefore the question whether Galway was a "tortfeasor who . . . would if sued have been liable" is not affected by any period of limitation running as between him and the plaintiff.

In *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[63] this point was discussed but not decided, and the division of opinion was equal; reliance is placed on the views of Lord Keith of Avonholm [64] and of Lord Porter [65]; and see also the view taken by Denning L.J.[66] in the Court of Appeal and the judgment of Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.*[67] On any view it is necessary to read some words into the section in order to construe it, and the court is asked to say that the words "if sued" mean "if sued when suable," that is, in proceedings capable of producing an adjudication on the issue of the other tortfeasor's liability, not in proceedings in which he could avoid liability by reason of special defences available as between him and the plaintiff. It is submitted that the view expressed by Lord Reid,[68] concurred in by Viscount Simonds,[69] that the words have a temporal connotation should not be preferred to that of Lord Keith of Avonholm. The basis of Lord Reid's [70] conclusion appears to have been that the interpretation involving the least disturbance of the existing law of limitation should be adopted, but it is important to remember that section 6 (1) made radical changes in the law and created a new cause of action. The "other tortfeasor" is entitled to the benefit of section 2 (1) of the

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[61] [1955] A.C. 169, 196.

[62] [1951] 1 All E.R. 522.

[63] [1955] A.C. 169.

[64] Ibid. 194, 195, 196.

[65] Ibid. 183.

[66] [1953] 2 Q.B. 501, 518; sub nom. *Littlewood* v. *George Wimpey & Co. Ltd. and B.O.A.C.*

[67] [1953] 1 W.L.R. 418, 419; [1953] 1 All E.R. 328.

[68] [1955] A.C. 169, 190.

[69] Ibid. 179.

[70] Ibid. 191.

Limitation Act, 1939, in respect of that cause of action; there is no reason why he should also be given the benefit of another period of limitation operative as between him and the plaintiff, or why the party claiming contribution whose cause of action is founded on a statutory right which is a different right from that of the plaintiff should be affected by any limitation running against the plaintiff. All the defences connected with the circumstances of the act or omission are open to the other tortfeasor in the third party proceedings. If the cause of action arises at the date of judgment, time runs in favour of the third party from then, and it should not be presumed that section 6 (1) (*c*) contemplates a double limitation in respect of the hypothetical action; it would be an absurd result if the cause of action given by the subsection were barred before it had accrued, not by anything done by the party entitled to claim contribution, but by the whim of the plaintiff in the conduct of his proceedings. Clear and express language would be required to confer upon the "other tortfeasor" the benefit of such a double limitation.

Harold Marnham for the third party. The third party proceedings are out of time under section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934. Section 1 (3) applies to proceedings "in respect of" a cause of action in tort, and had there been no tort the claim for contribution under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, would not have arisen. The statutory right to compensation, therefore, is derivative from the plaintiff's cause of action in tort, and although the claim is under the statute it is based on and "in respect of" the tort within section 1 (3) of the Act of 1934. In substance, these proceedings are an action in tort and the courts are not readily willing to permit an action which is in reality based on tort to be brought under the guise of an action in contract. To allow the defendants to do so in this case would be to make a serious inroad on the provisions of the Act of 1934: see the observations of Kennedy L.J. in *R. Leslie Ltd.* v. *Sheill* [71] in relation to the Infants Relief Act, 1874. [Reference was also made to *Tuckwood* v. *Rotherham Corporation*,[72] *Merryweather* v. *Nixan* [73] and *Jones* v. *Manchester Corporation*.[74]] Moreover, as was conceded in *Chant* v. *Read*,[75] a claim for contribution only subsists against the estate of a deceased person by

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[71] [1914] 3 K.B. 607, 621; 30 T.L.R. 460.

[72] [1921] 1 K.B. 526.

[73] (1799) 8 Term Rep. 186.

[74] [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[75] [1939] 2 K.B. 346, 352; 55 T.L.R. 624; [1939] 2 All E.R. 286.

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virtue of section 1 (1) of the Act of 1934; that Act, therefore, is the dominant Act, and the right given by section 1 (1) to proceed against the estate is subject to the restrictions imposed by subsection (3). Grave difficulties would result if the claim for contribution is not barred by section 1 (3); the employer of a deceased person ought not to have a better right against his estate than the party injured. [Reference was also made to *Morgan* v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.*[76]]

The defendants' cause of action for contribution under section 6 (1) (*c*) of the Act of 1935 was not a cause of action subsisting before the death of Galway; it does not come into existence until the date of judgment by this court in the plaintiff's action. The artificial meaning given to the words "subsisting against him "before his death" by section 1 (4) of the Act of 1934 does not avail the defendants; that subsection is governed by the words "Where damage has been suffered by reason of any act or omis-"sion in respect of which a cause of action would have subsisted" and refers to a case where the damnum and the injuria occurred at the same time. Here the damnum occurred on February 29, 1952, but there is no injuria until judgment is given against the defendants.

It is submitted that the words "if sued" in section 6 (1) (*c*) of the Act of 1935 mean "if sued at the time when the action "against the tortfeasor claiming contribution was brought" or "if sued at the time contribution is claimed"; two of the possible interpretations advanced by Lord Reid in *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[77] Lord Reid, whose view on this matter was concurred in by Viscount Simonds,[78] said [79] that "'if sued' must "have a temporal connotation." It is accepted that the question is open in this court, but reliance is placed on the fact that Lord Reid was the only member of the House of Lords who considered that a decision on this point was [80] "necessary for the decision" of that case. If that is the right view of section 6 (1) (*c*), the hypothetical action postulated is in this case barred by section 1 (3) of the Act of 1934, and the defendants' claim for contribution does not fall within section 6 (1) (*c*) of the Act of 1935.

The defendants' proposition that whenever a servant undertakes to do any work in his capacity of servant he warrants that he has the necessary skill to do the work and will do it throughout with proper care is too wide and is not supported by the decision in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[81] In *Harmer* v. *Cornelius*,[82] on which the decision in *Lister's* case was based, the duty was related only to the skill which the servant held himself out as having at the time when the contract of employment was entered into. The term to be implied is merely that the servant will carry out with reasonable skill and care those duties which he holds himself out to be capable of performing and which he contracts to perform; and Willes J.[83] said that an employer who employed a crossing sweeper to mend a watch would be held to have incurred all the risks himself. Not every act done by a servant in the course of his employment is necessarily an act which he was employed to do, nor one which he undertook to do by his contract of employment. There is nothing in *Harmer* v. *Cornelius* [84] to suggest that the implied term relates to all the acts carried out by a workman in the course of his employment. The implied term relates back to the contract of employment; if a workman's work alters during the employment, then in effect the contract of employment is varied or a new contract is entered into. *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[85] should be distinguished on the facts. In that case the workman was employed to drive and the decision was clearly on that basis and is not of general application: see in particular the opinions of Viscount Simonds,[86] Lord Morton of Henryton [87] and Lord Radcliffe [88]; see, also, the judgment of Denning L.J.[89] in the Court of Appeal. In this case Galway was not employed to drive but as a storekeeper; it was not part of his work as a storekeeper to drive the motor-cycle, nor was he under any obligation to do so. There is no evidence that he ever undertook to use skill and care in driving, and it is difficult to see how such a term could be implied into the contract of employment of a storekeeper.

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[76] [1953] 1 W.L.R. 418.
[77] [1955] A.C. 169, 186.
[78] Ibid. 179.
[79] Ibid. 190.
[80] Ibid. 188.

Before any term can be implied into Galway's contract of employment it would be necessary to determine by whom he was employed at the material time; if he was employed by Hudson the contract of service and the term to be implied might well have been limited. [Reference was also made to *Jones* v. *Manchester Corporation*,[90] *Semtex Ltd.* v. *Gladstone* [91] and *Mersey*

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[81] [1957] A.C. 555.
[82] 5 C.B.N.S. 236.
[83] Ibid. 246.
[84] Ibid. 236.
[85] [1957] A.C. 555.
[86] Ibid. 568.
[87] Ibid. 580.
[88] Ibid. 586.
[89] [1956] 2 Q.B. 180, 184.
[90] [1952] 2 Q.B. 852.
[91] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

Docks and Harbour Board v. *Coggins and Griffith* (*Liverpool*) *Ltd.*[92]]

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Stephen Chapman Q.C. in reply. The cause of action under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, is a separate, distinct cause of action created by the statute and is not "in respect of" the original tort: compare the cause of action under section 6 of the Workmen's Compensation Act, 1906, in *Tuckwood* v. *Rotherham Corporation.*[93] The cause of action under section 6 (1) (*c*) was in existence before the death of Galway, subject only to its maturing as to damage at the moment of judgment in the plaintiff's action; it amounted to a contingent liability to make contribution imposed on him by Act of Parliament and as such vested in his personal representative. That contingent liability is of the same character as that which was held to pass to the personal representative in *Batthyany* v. *Walford.*[94] It is similar also to the obligations under a contract, or, for example, tax obligations, which pass to the estate of a deceased person. If and in so far as the cause of action was not subsisting against Galway before his death, then section 1 (4) of the Act of 1934 applies. The cause of action for contribution, therefore, survives against the administratrix both under the general law and under the Act of 1934. It would be startling if section 1 (3) of the latter Act has altered the basic principles of the common law which have existed from earliest times; to achieve such a result an all-embracing expression such as "all causes of action" would be required.

The decision in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[95] is not limited to the case of a servant employed as a driver: see the judgments of the Court of Appeal.[96] Viscount Simonds[97] extended the duty to exercise care to the "so-called "unskilled operations."

[McNAIR J. What of the case where, for example, office staff assist in unloading ships during a dock strike? If a member of the office staff drove a crane, would the employers, if found liable in respect of his negligent or unskilled driving of the crane, be able to recover from him?]

In such a case the members of the office staff would be doing something right outside their normal scope of duty, and they would be volunteers in respect of that work. There may well be circumstances where, owing to an exceptional emergency, a servant does something which neither he nor his employer would regard as being part of his obligations as a servant.

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[92] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[93] [1921] 1 K.B. 526.

[94] 36 Ch.D. 269.

[95] [1957] A.C. 555.

[96] [1956] 2 Q.B. 180.

[97] [1957] A.C. 555, 573.

Cur. adv. vult.

February 18. McNAIR J. read the following judgment: On February 29, 1952, the plaintiff, Leonard Harvey, then a lad of 17 in the employment of the first defendants, R. G. O'Dell Ltd., was being driven as a passenger in a sidecar attached to a motor-cycle, of which the driver was one Galway, also in the employment of the first defendants, when the motor-cycle combination came into collision with a motor-car owned and driven by one Bolt on the Maidenhead–Hurley Road, and the plaintiff received injuries and Galway was killed.

In view of the somewhat complicated issues of law which this simple accident has raised between the plaintiff and the first and second defendants and the third party, the personal representative of the deceased Galway, it is convenient that I should first deal with the facts of the accident, since if no negligence is found against Galway, the action fails. I shall then deal with the plaintiff's injuries.

[His Lordship considered the evidence relating to the accident, found as a fact that the accident was due, in part at least, to the negligence of Galway, assessed the plaintiff's general damages at £1,500, and continued:] By his statement of claim delivered on April 9, 1954, the plaintiff alleged that the accident happened whilst, in the course of his employment and by reason of his contract of employment with the defendants, R. G. O'Dell Ltd., he was a passenger in the motor-cycle combination driven by Galway, the servant or agent of the defendants, and that the accident being caused by Galway's negligence, the defendants were vicariously liable. By their defence delivered on May 18, 1954, the defendants, whilst admitting that the plaintiff and Galway were in their employment, denied that either of them was acting in the course of his employment at the time of the collision, and alleged that they were in fact coming back to work after dinner, and that it was no concern of the defendants if Galway chose to use his motor-cycle for this purpose, or if the plaintiff chose to travel as Galway's passenger.

On August 8, 1957, an amended defence was delivered in which it was for the first time alleged that the work which took the plaintiff and Galway down to Maidenhead was no concern of the defendants, but was a private job for Hudson, their manager, undertaken by him on the instructions of his sister, and that Hudson was acting entirely outside the scope of his employment as manager in sending them down to Maidenhead, and that, accordingly, Galway was not at the material time acting as servant or agent of the defendants.

Accordingly, the plaintiff joined Hudson as a defendant, and by his amended statement of claim delivered on September 30, 1957, alleged in the alternative that he and Galway were in Hudson's employment, and that Hudson was vicariously liable for Galway's negligence, and in the further alternative he claimed against Hudson damages for breach of warranty of authority.

To this statement of claim Hudson on October 16, 1957, delivered a defence, in which he purports to admit that his instructions were not given and the work was not done on behalf of the first defendants, but solely on behalf of himself acting outside the scope of his employment, and that he was not expressly or impliedly authorized by the first defendants to give the instructions; he repeats the allegation made by the first defendants that at the time of the collision the plaintiff and Galway were not acting in the course of their employment, but were on their way back to resume their work at Hurley after having partaken of a meal at Maidenhead, and in answer to the claim for damages for breach of warranty he further alleges that the damages, if any, suffered by the plaintiff were not occasioned by any breach of warranty by him, but by the failure of the plaintiff to sue the personal representative of Galway within the time limited by law. This latter defence was not, however, persisted in at the trial before me.

I should add that by way of further particulars of the allegation in the amended statement of claim that Galway was at the time of the collision driving his motor-cycle combination as servant or agent of the defendants, and that it was in the course of the plaintiff's employment by the defendants that the plaintiff was a passenger in the motor-cycle combination at the material time, the plaintiff, by leave given at the trial, added (inter alia) the following particulars: "The said Galway was authorized by "the defendants and directed or requested by one Hudson, "their manager, to go to do a job at Hurley and take with him "the plaintiff in his motor-cycle combination. At all material "times he was being paid by the defendants and was further "entitled to travel expenses. At the time of the accident he "was returning from Maidenhead to Hurley having visited "Maidenhead for the purpose of obtaining tools or materials for "the job and in order to get something to eat for himself and "his assistant, the plaintiff. The conduct and control of the "whole day's operation had been left to the said Galway by the "aforesaid Hudson." At the trial both defendants appeared by the same counsel and solicitors.

I postpone for mention later in this judgment any reference to the third party proceedings launched by both defendants against the legal personal representative of the deceased Galway.

Upon these pleadings the issues may be summarized as follows: (1) Were the plaintiff's injuries caused or partly caused by the negligence of Galway? This I have already answered in the affirmative. (2) Were the plaintiff and Galway instructed by Hudson to go to Hurley to do work there for and on behalf of the first defendants? (3) If so, had Hudson express or implied authority from the first defendants so to instruct them? (4) If not, did Hudson warrant that he had such authority, or did he employ the plaintiff and Galway himself? (5) Was Galway in proceeding to Maidenhead for materials and food, or for food alone, and returning therefrom towards Hurley, acting within the course of his employment? (6) Was the plaintiff while travelling in Galway's sidecar back from Maidenhead acting within the course of his employment?

The facts as I find them are as follows: O'Dell Ltd., incorporated about 1934, carry on business primarily as builders and repairers of barges, but they also undertake general repair work; for example, if asked, they would accept orders for the repair of a private garage. There are two directors, neither of whom attends the company's works at Battersea regularly, though they both keep in touch by telephone daily. The general running of the business and allocation of the work is left to Hudson as manager; Hudson is a trusted employee with over 30 years' service. At the yard at Battersea at the material time one Kane acted as general foreman; when men were allocated for work away from the yard (as they frequently were) they were, if the work necessitated the use of substantial materials or heavy tools, conveyed by the company's lorry or van, but in other cases they made their own arrangements for travel, being reimbursed the cost of travel by public transport whether they in fact used it or not. The normal working day, whether in the yard or on outside jobs, was an 8-hour day from 8 a.m. to 5 p.m., with one hour off for dinner and with pay at overtime rates outside these hours. When sent on an outside job which involved absence for substantially the whole day, the men were given a subsistence allowance, known as "outdoor money," of 2s. per day; travelling time to and from the work was paid for as working time or overtime, as the case may be, and if they had to travel some distance (even several miles) to get a meal while out on a job, they would normally be paid their fares to and from their meal place, and reasonable travelling time for such purposes would probably be allowed and paid for as working time.

Galway, a man of 32 or 33 years of age, was engaged to act, and did act, as storekeeper at the yard. He owned a motor-cycle combination which he used for the journey between his home and the yard. As storekeeper he had from time to time to use his motor-cycle for the company's purposes, for instance, collecting light stores, and on occasion he used his motor-cycle for travelling to and from an outside repairing job. He paid for his own petrol and maintenance, but when out on the company's business, he was entitled to a travelling allowance based on the cost of public transport. He was a trusted employee of the defendant company.

Some time before February, 1952, Hudson, as a private venture, had a caravan built for him by the plaintiff's father, which he sold to his sister; this caravan, at the material time, stood on a caravan site at Hurley some five or six miles from Maidenhead.

On Thursday afternoon, February 28, Hudson received a telephone call from his sister at the caravan saying that she was in trouble (some cows having broken down a chain and link fence round her caravan) and asking for help. Without consulting either of his directors, Hudson decided to do what he could to help her. He saw Galway and told him that he would like him to go out on a job the next morning to repair the fence round the caravan, that he could take the plaintiff in his sidecar as his mate, and that he could make his own arrangements for meeting him at his home or at the yard. He chose Galway to do the job because he was the most suitable man available, as he had a motor-cycle and sidecar. Galway was free to decline Hudson's request, but in fact, as Hudson expected, he agreed. The same evening Hudson told the plaintiff that he would be going out with Galway the next morning, and that he was to see Galway to make arrangements. The plaintiff saw Galway and was told by him to meet him at the yard next morning at about 7 a.m.; he was also told by Galway that they would be out all day and that they would get dinner out.

Next morning, shortly before 7 a.m. and after the plaintiff's arrival, Galway put in an appearance at the yard and collected a brace and bit and some tools from the store and, putting them in the sidecar, proceeded with the plaintiff to Hurley, where they worked for four or five hours. Galway then told the plaintiff that they would have to go into Maidenhead to get some further tools and materials.

They went into Maidenhead, Galway dropping the plaintiff at a café, where he joined the plaintiff half an hour later, and they both had coffee and sandwiches. Having finished their meal, they returned to the motor-cycle combination, where the plaintiff found in the sidecar a small parcel at his feet which he described as being hard and about a foot long, but he said that he had no idea of its contents.

I interpose here to say that at one time I was uncertain whether I could safely accept the plaintiff's story as to the tools, as no mention of this feature in the journey into Maidenhead was mentioned in the original particulars given on the plaintiff's behalf; but on reflection I have come to the conclusion that I should accept the plaintiff's evidence in this matter. To find that he had invented this story would be to find him guilty of deliberate perjury and to credit him with an appreciation of the legal significance of the tools which I am satisfied he did not possess. The story is not inherently improbable, and I accept it.

The distance from Hurley to Maidenhead is just over five miles, and a journey of that distance was not unreasonable, whether its object was the collection of further tools and materials or to obtain midday refreshments, or either or both; nor was it unreasonable that Galway, the older man who was in charge of the whole operation, should take the plaintiff into Maidenhead with him. It was on the way back from Maidenhead that the accident happened.

It would have been quite impracticable for Galway and the plaintiff to do the journey to Hurley and back by public transport and to complete the work there in the day. According to Hudson, it would have been open to the company to render a charge for the work to his sister, though in fact they did not; if they had raised a charge against her, Hudson would have paid it himself rather than trouble her.

After the accident Hudson himself entered particulars of the

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plaintiff's accident in the first defendants' accident book, and the plaintiff was credited in the company's wages sheet with wages apparently for 10 hours for his work on that day. After the accident Hudson told the senior director that he had sent the two men down to do a job on his sister's caravan, and no objection was taken by the director.

Neither of the directors was called as a witness, but two answers to interrogatories sworn to by the younger director on May 13, 1955, before the delivery of the amended defence, were put in, in which he states plainly that Galway was instructed by Hudson to do the work on the caravan site, and no suggestion was made in those answers that Hudson was acting outside his authority in giving these instructions.

In my judgment it is fully established: (a) that Hudson was acting within the scope of his authority from the company when he requested Galway to proceed to Hurley, taking the plaintiff with him, to carry out the repairs to the fence, and that this request was, in accordance with his general practice, and that of the company when dealing with its employees, in effect an instruction; and (b) that in using his motor-cycle and sidecar for the purpose of his own conveyance and the conveyance of the plaintiff, Galway was using the authorized and only practical method of transport in order to carry out their work on behalf of the company as so instructed.

There remains for consideration (1) the question whether in using his motor-cycle combination for the purpose of the journey from London to Hurley, Galway was acting within the course of his employment; and (2) the more limited and vital question whether on the journey from Maidenhead to Hurley, in which the accident happened, Galway was so acting.

On behalf of the defendants it was urged that both questions should be answered in the negative, and an elaborate citation of authorities was made by both counsel on these points. On the first point Mr. Chapman relied upon a series of authorities under the repealed Workmen's Compensation Acts to establish the proposition that a workman's journey from his home or other place to his place of work, or vice versa, is not in the course of his employment, even if the transport is provided by the employer (or even if private transport is used which it is contemplated shall be used) unless there is an obligation upon the workman to use that means of transport.

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The cases of *St. Helens Colliery Co. Ltd.* v. *Hewitson*[1] (a case in which the workman was injured in a colliery train provided by his employers for his journey from his work to his home, but which the workman was under no obligation to use) and *Parker* v. *Owners of Ship Black Rock*[2] (a case in which a ship's fireman was injured when going ashore, with leave, to buy provisions for himself, being under no obligation to do so) were cited in support of this proposition. *Weaver* v. *Tredegar Iron and Coal Co. Ltd.*[3] is a case on the other side of the line, which illustrates clearly the very refined distinctions which have been drawn in the cases decided under these particular Acts. Even on these authorities I think it is probable that on the facts of this particular case as I have found them, and in particular the fact that Galway had in the course of his duty to pick up his tools and materials at the yard, any injury suffered on the journey would have been held to have arisen out of and in the course of his employment. But I am by no means satisfied that this line of authority has any relevance, or any strict relevance, to the question which I have to decide, namely, whether in making the journey to Hurley, Galway was acting within the course of his employment so as to make his employers vicariously liable.

On this question the Judicial Committee, in *Canadian Pacific Railway Co.* v. *Lockhart*[4] (a case dealing with the vicarious responsibility of the employer for injuries caused by the servant's negligence in driving a motor-vehicle), accepted as accurate the statement of principle contained in Salmond on Torts, 9th ed. (1936), at p. 95, as follows: “ ‘It is clear that the master is “ ‘responsible for acts actually authorized by him: for liability “ ‘would exist in this case, even if the relation between the “ ‘parties was merely one of agency, and not one of service at “ ‘all. But a master, as opposed to the employer of an “ ‘independent contractor, is liable even for acts which he has “ ‘not authorized, provided they are so connected with acts “ ‘which he has authorized that they may rightly be regarded “ ‘as modes—although improper modes—of doing them. In “ ‘other words, a master is responsible not merely for what he “ ‘authorizes his servant to do, but also for the way in which “ ‘he does it. . . . On the other hand, if the unauthorized and “ ‘wrongful act of the servant is not so connected with the

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[1] [1924] A.C. 59; 40 T.L.R. 125.

[2] [1915] A.C. 725.

[3] [1940] A.C. 955; 56 T.L.R. 813; [1940] 3 All E.R 157.

[4] [1942] A.C. 591, 599; [1942] 2 All E.R. 462.

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" 'authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case " 'the servant is not acting in the course of his employment, " 'but has gone outside of it.' "

The headnote in *Lockhart's* case,[4] which I think accurately sets out the effect of the decision, is as follows: "Where a "servant of the appellant company, in disregard of written "notices prohibiting employees from using privately owned "motor-cars for the purposes of the company's business unless "adequately protected by insurance, used his uninsured motor-car on a journey for the purpose of, and as a means of execution "of, work which he was ordinarily employed to do, and by "negligent driving injured the respondent:—*Held*, that the "means of transport was incidental to the execution of that "which he was employed to do, and that the prohibition of the "use of an uninsured motor-car merely limited the way in which, "or by means of which, he was to execute the work, and that "breach of the prohibition did not exclude the liability of the "company to the respondent." So in *Lockhart's* case[5] the employer was held liable for the negligence of the servant in performing a journey on his employers' behalf by a prohibited means, namely, in an uninsured private car—clearly a stronger case than the present.

Similary, in *McKean* v. *Raynor Brothers Ltd. (Nottingham)*,[6] Hilbery J. came to a like conclusion. The headnote in that case reads as follows: "A workman employed by the defendants as "a general utility hand was instructed by the defendants to "take a lorry and meet and give a message to a convoy which "was coming by road. He proceeded on his journey, but instead "of taking the firm's lorry he used his father's car and whilst "driving negligently he collided with and killed the plaintiff's "husband. . . . The plaintiff"—that is, the widow—"contended that the workman was acting within the scope of his "authority and in the course of his employment and that the "defendants were liable for damages. The defendants contended that by taking a private car instead of the lorry which "he was instructed to take the workman had changed the journey "from an authorized to an unauthorized journey:—*Held*: the "workman was doing an authorized act within the scope of his "employment and, although it was done in an unauthorized "way, it was not done in a prohibited way and the defendants

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[4] [1942] A.C. 591.

[5] Ibid.

[6] [1942] 2 All E.R. 650.

"were liable." Both those cases are stronger cases in favour of the injured person than the case I have to decide.

In my judgment, once it is found that Galway was instructed to take the plaintiff with him to do work on the first defendants' behalf at Hurley, the inevitable conclusion in law is that the first defendants would be vicariously liable for his negligent method of performing that journey even if they had not, as they had, expressly authorized the means of transport which was used, unless in the course of the journey Galway had gone outside the scope of his employment by doing something solely for his own purpose.

I now turn to the second and more limited question, namely, whether on the journey from Maidenhead back to Hurley Galway was acting within the scope of his employment. If the primary purpose, or the main purpose, of the trip to Maidenhead was to get further tools necessary for the completion of the work at Hurley, it is clear that the journey into Maidenhead and back to Hurley was as much within the scope of Galway's employment as was the journey to Hurley from London; and accepting as I do the plaintiff's evidence on this point, I am prepared to hold that such was the purpose of the journey. But in my judgment the same result would follow if the primary purpose of the journey into Maidenhead and back was to get a meal, or if that was the main purpose, provided only that the journey to Maidenhead and back could properly be regarded as fairly incidental to the day's work on which Galway and the plaintiff were engaged. It is significant that no evidence was given on behalf of the defendants to the effect that Galway was not entitled to take the plaintiff into Maidenhead for a meal.

In my judgment, while not attempting to lay down any general principle, I am satisfied that, on the particular facts of this case as I have found them, the journey to Maidenhead and back, even if no question of tools had arisen, should be regarded as fairly incidental to the work which Galway and the plaintiff were instructed to do. It was an all-day job; no instructions were given by Hudson that the men should take food with them; Galway told the plaintiff that they would get their dinner out. They were paid subsistence money and the travelling time to and from Maidenhead would have counted, and apparently was counted, as working time.

As stated above, I am satisfied affirmatively that the journey should be so regarded. At the same time it is right that I should say that had the matter been left in doubt I should have accepted

Mr. Gardiner's submission on behalf of the plaintiff that the burden of proof that this particular part of the journey was outside the scope of Galway's employment lies upon the first defendants, and that there was no sufficient evidence to discharge that burden.

Accordingly, there will be judgment for the plaintiff against the first defendants for the sum of £1,598 10s., with costs, including any additional costs incurred by the plaintiff in the proceedings against the second defendant; there will be judgment for the second defendant without costs and an order that the first defendants do pay to the second defendant his costs of the action, all such costs to be taxed if not agreed, and to include costs incurred by Joseph Henry Harvey, the father of the plaintiff suing as his next friend, up to the date of the adoption of the plaintiff of the proceedings upon his becoming of full age.

I now turn to the third party proceedings brought by the first defendants against Louise Galway, now Doye, the widow and administratrix of the deceased Galway. The following dates are material: February 29, 1952, the date of the accident and of Galway's death; May 24, 1952, the date when letters of administration were granted; and March 14, 1955, the date of the third party notice by the first defendants.

By their statement of claim in the third party proceedings the first defendants based their claim on two alternative grounds: (1) that the deceased Galway was a tortfeasor who would, if sued, have been liable to the plaintiff, and that accordingly, there being no personal blame alleged against the first defendants, they are entitled to claim 100 per cent. contribution pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6; and (2) that it was a term of the deceased Galway's contract of employment that he would so conduct himself as not by negligence on his part to impose liability upon the defendants. By her re-amended defence the third party raises two defences of substance: (1) that proceedings in respect of the defendants' alleged rights of action and each of them were not pending against the deceased at the date of his death, nor were they taken within six months after the third party, his personal representative, took out representation and were and are therefore barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934; and (2) that the deceased was not a tortfeasor who would, if sued, have been liable to the plaintiff within the meaning of section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, or at all.

It will be convenient if I first deal with the alleged cause of action based upon the implied term in Galway's contract of employment. On this point the issues may be analysed as follows: A (1) If Galway had been alive today, would the first defendants have been entitled to recover against him as damages for breach of the alleged term in his contract of employment the amount which the first defendants have become liable to pay by reason of his negligence? A (2) If so, is that cause of action maintainable against the administratrix (subject to assets being available) or is it barred by section 1 (3) of the Act of 1934?

With regard to A (1), in support of this alleged cause of action reliance was placed upon the decision of the House of Lords in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[7] It is, in my judgment, indisputable on the basis of that authority that if Galway had been engaged and employed by the first defendants as a driver of a motor vehicle, the first defendants would have been entitled to recover from Galway, if alive, the amount of the judgment together with costs which they had paid or had become liable to pay as damages for breach of the implied term in his contract of employment that he would use reasonable skill and care in driving; see the speech of Viscount Simonds, where he said[8]: "It is, in my opinion, clear that it was an implied term "of the contract that the appellant would perform his duties "with proper care. The proposition of law stated by Willes J. "in *Harmer* v. *Cornelius*[9] has never been questioned: 'When "'a skilled labourer,' he said, 'artizan, or artist is employed, "'there is on his part an implied warranty that he is of skill "'reasonably competent to the task he undertakes,—Spondes "'peritiam artis. Thus, if an apothecary, a watch-maker, or an "'attorney be employed for reward, they each impliedly under"'take to possess and exercise reasonable skill in their several "'arts. . . . An express promise or express representation in "'the particular case is not necessary.'" Viscount Simonds continues[10]: "I see no ground for excluding from, and every "ground for including in, this category a servant who is employed "to drive a lorry which, driven without care, may become an "engine of destruction and involve his master in very grave "liability. Nor can I see any valid reason for saying that a "distinction is to be made between possessing skill and exer"cising it. No such distinction is made in the cited case: on

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[7] [1957] A.C. 555; [1957] 1 All E.R. 125.

[8] [1957] A.C. 555, 572.

[9] (1858) 5 C.B.N.S. 236, 246.

[10] [1957] A.C. 555, 573.

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" the contrary, 'possess' and 'exercise' are there conjoined. " Of what advantage to the employer is his servant's undertaking " that he possesses skill unless he undertakes also to use it? I " have spoken of using skill rather than using care, for 'skill' is " the word used in the cited case, but this embraces care. For " even in so-called unskilled operations an exercise of care is " necessary to the proper performance of duty."

From this it was argued on behalf of the first defendants that once it is established, as it has been by my judgment, that on the occasion in question Galway was acting within the course of his employment, the contractual obligation to drive without negligence is established. On behalf of the third party, however, it was submitted that on the authorities the implied term only extends to the performance of those duties which the servant expressly or impliedly professes to possess at the time when he enters into the contract of service.

It is not without significance that in the famous judgment of Willes J. in *Harmer* v. *Cornelius*,[11] part of which is quoted in, and forms the starting point of, Viscount Simonds' conclusion in *Lister's* case,[12] there appears the following passage by way of qualification or amplification of the passage quoted[13]: " It may be, that, if there is no general and no particular repre- " sentation of ability and skill, the workman undertakes no " responsibility. If a gentleman, for example, should employ a " man who is known to have never done anything but sweep a " crossing, to clean or mend his watch, the employer probably " would be held to have incurred all risks himself."

Furthermore, I think that it is clear that in each of the speeches of the Lords who formed the majority in the House of Lords, there are plain indications that their Lordships were dealing only with the normal engagement of a servant to drive a lorry or other motor-vehicle on the road; see Viscount Simonds[14]: " Nor was it suggested that in the present case " there were any features which distinguished the relation of the " appellant and the respondents from that of any other driver " and his employer "; see also Lord Morton of Henryton[15]: " the appellant was under an implied contractual obligation to " take reasonable care in driving the vehicle which he was " employed to drive "; Lord Tucker[16]: " a servant employed to " drive a vehicle in the course of his employment by his master

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[11] 5 C.B.N.S. 236, 246.
[12] [1957] A.C. 555, 572.
[13] 5 C.B.N.S. 236, 246.
[14] [1957] A.C. 555, 576.
[15] Ibid. 555, 580.
[16] Ibid. 592.

"owes a duty to his master to take reasonable care"; and Lord Somervell of Harrow[17]: "I therefore accept the submission on behalf of the employers that there is normally a contractual duty on a servant to take care." I do not read *Lister's* case[18] as laying down a proposition of general application that whenever an employed person drives a motor-vehicle within the course of his employment he impliedly agrees vis-à-vis his employer to take reasonable care in such driving and to indemnify him for any failure.

Galway was engaged and employed by the first defendants as a storekeeper; as a concession to the first defendants he from time to time used his own motor-cycle on their business and was so using it at the time of the accident. I find it difficult to see on what grounds of justice and reason I should hold that by making his motor-cycle combination available for his employers' business on a particular occasion he should be held in law to have impliedly agreed to indemnify them if he committed a casual act of negligence.

Suppose in a time of labour disturbances in the docks, master stevedores, as sometimes happens, induce their office staff to man the cranes or to do stevedoring; if a third party is injured through the negligence of such staff, no doubt the master stevedores would be vicariously liable, as, indeed, they might be primarily liable, on the basis that they had employed unskilled persons. But it would surely be contrary to all reason and justice to hold that the willing office staff, by abandoning their ledgers and undertaking manual tasks, had impliedly agreed to indemnify their employers against liability arising from their negligence in performing work which they were not employed to do.

I should, therefore, dismiss the claim of the first defendants against the third party, in so far as it rests upon an allegation of breach of the contract of employment.

This conclusion renders it unnecessary for me to express any final opinion upon the second question, A (2), under this head; it is sufficient for me to say that inasmuch as this cause of action, if maintainable, would be an action in contract and not in tort, it would not be barred by the Act of 1934, but would survive independently of this Act against the administratrix up to the extent of the assets remaining in her hands, like any other claim arising in contract.

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[17] [1957] A.C. 555, 598.

[18] Ibid. 555.

I now turn to the defendants' second ground of claim against the third party, based upon section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, which so far as is material provides: "(1) Where damage is suffered by any person as a "result of a tort . . . (c) any tortfeasor liable in respect of that "damage may recover contribution from any other tortfeasor "who is, or would if sued have been, liable in respect of the "same damage, whether as a joint tortfeasor or otherwise. . . ."

The first defendants and Galway are in law joint tortfeasors (see *The Koursk*,[19] *per* Scrutton L.J.[20]) and inasmuch as the first defendants' liability on the facts found is purely vicarious, the claim for contribution by Galway, if good in law, should, in my view, be for 100 per cent.

The material questions on this branch of the case may be summarized as follows: B (1) What is the nature of the right of contribution? Are the third party proceedings proceedings "in "respect of a cause of action in tort" so as to be barred by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, as not being pending against Galway at the date of his death, or as not having been taken against the administratrix within six months of the taking out of representation? B (2) Is the cause of action for contribution a cause of action which subsisted against Galway at the date of his death, within the meaning of section 1 (1) of the Act of 1934? If not, is it a cause of action which is maintainable against the administratrix up to the amount of the assets apart from the Act of 1934? B (3) Is there in the expression "who . . . would if sued have "been liable" in section 6 (1) of the Act of 1935 any temporal connotation referring to the time when the hypothetical action must be assumed to have been brought? If it means, as the third party submits, a person who, if sued at the time when the action was brought against the tortfeasor claiming contribution, or at the time when the contribution proceedings were brought, the third party was not such a person, since no action in tort could be brought against her in respect of Galway's tort after November 23, 1952.

B (1): What is the nature of the right of contribution? Are the third party proceedings proceedings in respect of a cause of action in tort? In my judgment it is plainly established on the authorities that the right of contribution between tortfeasors is a right sui generis conferred by statute similar to the right of contribution conferred by section 30 (2) of the Workmen's Compensation Act, 1925; see the cases of *Littlewood* v. *George Wimpey & Co. Ltd. and B.O.A.C.*,[21] see also the same case under the name of *George Wimpey & Co. Ltd.* v. *B.O.A.C.*,[22] in the House of Lords, and *Post Office* v. *Official Solicitor*.[23] Furthermore, if the third party proceedings themselves are not founded in tort, they are not proceedings in respect of a cause of action in tort within the meaning of section 1 (3) of the Act of 1934; the expression plainly means proceedings to enforce a cause of action in tort.

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[19] [1924] P. 140; 40 T.L.R. 399.

[20] [1924] P. 140, 155.

Question B (2) is: Is the cause of action for contribution a cause of action which subsisted against Galway at the date of his death? If not, is it a cause of action which is maintainable against the administratrix up to the amount of the assets apart from the Act of 1934? In my judgment it is also clear that the cause of action for contribution under the Act of 1935 did not arise until judgment in this action. I think this conclusion is implicit, though not a matter of decision, in the speeches in the House of Lords in *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[24] In *Post Office* v. *Official Solicitor*[25] Barry J. held[26] (it being common ground that a similar claim for contribution under section 30 (2) of the Workmen's Compensation Act, 1925, did not arise until payment of compensation was made) that notwithstanding that the payment was not made until after the death of the person from whom contribution was sought, the claim for contribution was subsisting against the deceased person at the date of his death within the meaning of section 1 (1) of the Act of 1934 by reason of the provisions of subsection (4).

The reasoning of Barry J. seems equally applicable to the present claim for contribution under the Act of 1935, and I would respectfully adopt it. But even if this conclusion is wrong, it seems to me that section 1 of the Act of 1934 is not by its terms comprehensive, and that the present claim for contribution would survive against the administratrix like any other claims not expressly dealt with by that section.

Question B (3) is: Is there in the expression "who . . . "would if sued have been liable" in section 6 (1) (*c*) of the Act of 1935 any temporal connotation referring to the time at which

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[21] [1953] 2 Q.B. 501; [1953] 2 All E.R. 915.

[22] [1955] A.C. 169; [1954] 3 All E.R. 661.

[23] [1951] 1 T.L.R. 333; [1951] 1 All E.R. 522.

[24] [1955] A.C. 169.

[25] [1951] 1 All E.R. 522.

[26] Ibid. 525.

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the hypothetical action must be assumed to have been brought? In *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[27] this point was much debated but was not, as I think, finally decided either way. Viscount Simonds and Lord Tucker decided the case against the appellant, the party claiming contribution, on the ground that the third party having, when sued in the action, succeeded on the plea based upon section 21 of the Limitation Act, 1939, could not be said to be a person who, if sued, would have been held liable, a view not shared by the remaining members of the House.

Lord Reid (who, with Viscount Simonds and Lord Tucker, formed the majority in favour of dismissing the appeal) held[28] that "if sued" had a temporal connotation and meant either "if sued when the tortfeasor claiming contribution was sued" or "at the time when the former tortfeasor claims contribution" and that for the purpose of the appeal then before the House it was not necessary to decide which. Viscount Simonds, *obiter*, was prepared to accept Lord Reid's conclusion.

On the other hand, Lord Porter and Lord Keith of Avonholm, who dissented, held that the words of the statute were satisfied if the party against whom contribution was sought would have been liable if sued at any time.

In my judgment the phrase "who . . . would if sued have "been liable" if construed literally contains no temporal connotation except that for the institution of the hypothetical action the words "would . . . have been liable" plainly contemplate that the hypothetical action has been instituted at some time before the claim for contribution arose. This, as I have found, is the date of the judgment against the party seeking contribution. Literally construed, the phrase in my judgment means "who "would, if sued at any time, have been liable"—that is, held liable. Is there any reason for not adopting this literal construction?

On behalf of the third party, it is argued that it is unreasonable and unjust that she should be exposed to suit many years after she has by lapse of time become protected as against the original injured party. On the other hand, it is pointed out on behalf of the first defendants that it is unreasonable that their rights against their joint tortfeasor should be determined by the whim of the injured party in not proceeding against the other tortfeasor in due time or at all. And it is said that, if the limitation contended for by the third party is adopted, it would

[27] [1955] A.C. 169.

[28] Ibid. 189, 190.

be necessary for every person who is involved in an accident causing injury, for which he may be held liable with a right over against another party, to commence declaration proceedings against that other party within that party's limitation period, even though the former party has not yet been sued himself.

These arguments based upon inconvenience seem to me to be very equally balanced. Accordingly, I see no valid reason why the literal construction should not be adopted. This construction does not, as I think, involve reading in any words at all; on the other hand, it does avoid the necessity of reading in words of limitation which are not there.

I am fortified in this conclusion which I have adopted by the judgment of Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ltd. and Samuel Fox & Co. Ltd.*,[29] the reasoning of which I respectfully adopt.

There will be judgment accordingly for the first defendants against the third party for an indemnity against their liability under the judgment in the action, together with their costs and the costs of the third party proceedings.

Judgment for the plaintiff against the first defendants.
Judgment for the first defendants against the third party.

Solicitors: *R. I. Lewis & Co.; J. F. Coules & Co.; William Easton & Sons.*

J. F. L.

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[29] [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328.

C. A.

1958
April 23, 24.

Jenkins, Parker and Pearce L.JJ.

WILSON *v.* TYNESIDE WINDOW CLEANING CO.

[1956 W. No. 207.]

Negligence—Safe system of work—Dangerous premises—Employer's duty—Employee required to work in premises not in the occupation of the employer—Window cleaning—Defective Handle—Liability of employer—Whether duty to warn experienced workmen.

The plaintiff, a window cleaner of 56 with a life-long experience in the trade, was cleaning from the outside a window in a brewery, when a handle, by which he was supporting himself gave way, and he fell and received injury. He had often cleaned the window before, and knew that the woodwork was unsound. From his experience he knew that it was unsafe to trust to handles. He had worked for the defendants for some 14 years, and was already thoroughly experienced when he joined them. He had never received any instructions regarding safety precautions, except a standing order to the effect that if he found a window which presented unusual difficulty or risk, he was to report to the defendants for further instructions.

In an action for damages for negligence, it was claimed, first, that the defendants were under a duty to provide a place of work as safe as reasonable skill and care could make it, and that at least they should have inspected the premises from time to time; secondly, that they should have issued warnings in writing and orally from time to time, against the dangers of window cleaning in general, and those connected with unsafe handles in particular. Donovan J. held that the defendants had fulfilled their duty of care and dismissed the action. On appeal:—

Held, dismissing the appeal, that in the case of so experienced a workman as the plaintiff, the defendants had fulfilled their duty to take reasonable care for his safety. That duty, though conveniently divided for the purposes of argument in individual cases into such subdivisions as the provision of reasonably safe premises, or tools, or systems of work, was one and the same. As to premises, there was a great difference in degree between the performance of the duty when the premises were the master's own or those of a stranger. As to system, when the workman was so experienced, and the danger was so patent, the issue or repetition of warnings would be likely to do more harm than good.

Biddle v. *Hart* [1907] 1 K.B. 649; 23 T.L.R. 262 applied.

Hodgson v. *British Arc Welding Co. Ltd.* [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95 approved.

Taylor v. *Sims & Sims* [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375 and *Cilia* v. *H. M. James & Sons* [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9 explained.

Dicta of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ltd.* [1952] 1 K.B. 141, 148; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39 (affirmed sub nom. *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180; [1952] 2 All E.R. 1110) considered.

Decision of Donovan J. affirmed.

APPEAL from Donovan J. at Newcastle Assizes.

The following statement of facts is taken from the judgment of Pearce L.J.

The plaintiff appealed from a judgment of Donovan J. given at York Assizes on June 14, 1957, dismissing his claim for damages for personal injury suffered in an accident sustained by him when he was working for the defendants as a window cleaner. The plaintiff alleged negligence against the defendants. The defendants denied negligence but made no allegation of contributory negligence. The judge assessed the damages, in case of appeal, at £4,320.

The plaintiff was a man of 56 at the time of the accident. He had been a window cleaner all his working life, and was a trained and very experienced man in that occupation. He had worked for the defendants for 13 or 14 years. He had been a chargehand with his previous employers, and acted in that capacity with the defendants when he was needed to do so. He had taught many hundreds of persons how to carry on their trade.

The defendant firm had been in existence for 60 years, employing at times up to 50 men, and so far as accidents were concerned had a good record. The defendants had a contract to clean the windows of the Newcastle Breweries once a quarter, a task which took two men three or four days. The plaintiff had done work on the breweries frequently in the last 10 years before the accident. There was no inspection of the premises before the starting of the work. On September 3, 1954, the plaintiff and another man went to perform the quarterly cleaning. In due course the plaintiff cleaned the window with which this case is concerned. It was 12 ft. from the ground; it overlooked a street with a rather steep incline. He had cleaned that same window three months before and on other previous occasions. There had originally been handles on each side of the underneath of the upper sash, but for some two or three years there had been only one handle remaining, namely, that on the right. The room to which the window belonged was a kitchen. The steam condensed and ran down, causing the woodwork to rot. To the plaintiff it appeared " all rotten," to use his own words; and he said that the sash was always a bit stiff. The plaintiff first cleaned the window from the inside. Then he put up his 28 ft. extending ladder and wedged it firmly on the ground. Standing on the ladder, he cleaned the bottom half first. Then he took hold of the handle with his right hand and put the fingers of his left hand over the putty on the bottom bar of the top sash, in order to pull the sash down. He had so used that handle three months before and on previous occasions. He gave a pull on the handle. It came away in his hand, so that he lost balance and fell off the ladder, suffering severe injuries. The judge found that he gave a pull of sufficient strength to bring the top half of the window down had the handle remained firm. The plaintiff complains of that finding as putting the strength of the pull too high. But the judge took into account the fact that the pull was enough to throw him off balance.

When the plaintiff went to work for the defendants he knew that he should not trust handles on windows, but he had never himself experienced the coming off of a handle. The defendants had never given him general safety instructions, or said anything to him specifically about handles. But in answer to the judge's question " When you first went to this company if someone had " said to you ' Never trust handles on windows ' would that have " been something you knew already?," the plaintiff said " Something I knew already." The judge described the extent of the plaintiff's knowledge and information in these words: " If in the " course of his work the plaintiff came across a window the cleaning of which presented some unusual difficulty, and the plaintiff " was in doubt whether he could clean it safely, then the system " was that he should leave the window uncleaned, report the " fact to the defendants, and ask for further instructions. He " was told to do this when he first joined the defendant firm in " 1942. Mr. Waller [for the plaintiff] says that to call that a " system was putting the matter higher than the evidence justified. But I do not think that that criticism is made out. The " plaintiff had cleaned this particular window many times previously himself, the last occasion being the June before the " September when he met with his accident. In that June, he " had pulled the top half of this window down all right despite the " missing handle, though the window was always a bit stiff to " move. He knew that the window had had only one handle " for years, and, as already mentioned, he saw that the state of " the woodwork of the window was rotten. He knew from " experience that one should not trust to handles on windows, " that is, that he should not pull on them under any circumstances in which, if the handle gave way, he would run the " risk of injury. He knew that he should test the handle first. " No general instructions were given to him when he joined the " defendants as to how he should clean windows. He already " knew. No warning against using window handles as handholds " lest they should give way was given to him, but he was already " aware of this danger. He had cleaned very many windows " having handles similar to the one in the present case: such " handles were common in the Newcastle district, and, while " one had never come off before while he was holding it, he was " aware of the possibility that one might—' I knew all along ' " he said ' that one should not trust to handles.' "

There was evidence that handles coming off were frequent causes of accidents. One Davis, a surveyor called for the plaintiff, made four criticisms of the defendants' behaviour. First, he said that there ought to be printed rules; and he produced a booklet which set out clearly what are the perils and what matters should be avoided. He said that that booklet ought to be given to the employees and that they should be made to sign a document to say that they had read it, because although they might be aware of the warnings contained in it it was necessary to drive those warnings home. Secondly, he said that the men should be told that where there was only one handle remaining on an upper sash, the sash should be opened from the inside. Thirdly, he recommended regular visits, say once or twice a year, by someone in authority, to see that the employees were doing their work properly and that all was going well—that being chiefly designed to impress on them the importance of obeying safety rules. He admitted that there was a field where one had to leave it to the men to find defects and report. He had no knowledge of what the practice is in the window-cleaning trade; and he had no knowledge of preliminary inspections being made before the men worked on a particular job; but he had heard of people coming round as overseers to see that the work was being properly done.

Donovan J. gave judgment for the defendants. The plaintiff appealed.

G. S. Waller Q.C. and *R. P. Smith* for the plaintiff. As it was established by evidence that handles of this sort are the cause of frequent accidents, the judge should have found that the defendants failed in performing their duty of care towards the plaintiff; they failed to provide a reasonably safe system of work and a reasonably safe place of work.

Although the accident occurred on premises which were not the defendants', it is their duty as employers to provide a safe place of work so far as care and skill can secure that result: see Lord Maugham's speech in *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[1] They do not fulfil that duty by delegation to the brewery company or anyone else: see *Paine* v. *Colne Valley Electric Supply Co. Ltd.*[2]; *Naismith* v. *London Film Productions Ltd.*[3] and *Biddle* v. *Hart.*[4] The defendants should at least have made regular inspections of the premises where their men were to work, and issued warnings whenever necessary. In *Christmas* v. *General Cleaning Contractors Ltd.*[5] Denning L.J. said that since the decision in *London Graving Dock Co. Ltd.* v. *Horton*[6] employers who send their men to work in outside premises must take reasonable care to see that the premises are safe or take proper steps to protect the men from the dangers present. It is not open to the defendants to say that the accident would have happened even if instructions and warnings had been given, as the plaintiff would probably have ignored them: see *Drummond* v. *British Building Cleaners Ltd.*[7]

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[1] [1938] A.C. 57, 87; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[2] 55 T.L.R. 181; [1938] 4 All E.R. 803.

[3] [1939] W.N. 86 (Practice Note); [1939] 1 All E.R. 794.

[4] [1907] 1 K.B. 649; 23 T.L.R. 262.

[PARKER L.J. It is doubtful how far that principle can now stand in view of the decision of the House of Lords in *Bonnington Castings Ltd.* v. *Wardlaw*[8] that the onus is on the plaintiff to prove on the balance of probabilities that the breach caused or materially contributed to the injury.]

It is submitted that the fact that the defendant in certain circumstances cannot be heard to make a particular allegation does not detract from the general onus on the plaintiff.

In both the *Christmas* case[9] and the present case the risk could have been met by the giving of a positive instruction to deal with the particular danger. The defendants should have made regular visits of inspection and complained to the brewery company that the window was unsafe. The cases of *Garrard* v. *A. E. Southey & Co. and Standard Telephones and Cables Ltd.*[10] and *M'Quilter* v. *Goulandris Brothers Ltd.*[11] support the contention that an employer is responsible for the safety of his men on the property of others. If the window had been on the defendants' own premises, there clearly could have been no defence. The cases of *Taylor* v. *Sims & Sims*[12] and *Cilia* v. *H. M. James & Sons*,[13] in which it was decided that a master has no responsibility for the safety of his servants on the premises of others over which he has no control, are against the clear line of authority and were criticized by Parker L.J. in *Davie* v. *New Merton Board Mills Ltd.*[14] In *Thomson* v. *Cremin*[15] a stevedore working in the

[5] [1952] 1 K.B. 141, 148; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39.

[6] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[7] [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507.

[8] [1956] A.C. 613; [1956] 1 All E.R. 615.

[9] [1952] 1 K.B. 141.

[10] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

[11] (1952) 102 L.Jo. 7.

[12] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[13] [1954] 1 W.L.R. 721; [1954] 1 All E.R. 9.

[14] [1958] 1 Q.B. 210, 242; [1958] 1 All E.R. 67.

[15] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185; sub nom. *Cremin* v. *Thomson* (1941) 71 Ll.L.Rep. 1; 1956 S.L.T. 357.

hold of a ship, who was injured owing to the negligence of shipwrights who had been employed by the shipowners, succeeded against the shipowners but not against his employers, but all the Lords who decided the case found no negligence in the employers; that case is not conclusive because the present issue was never raised. It may be said that where an employer sends his men to work by contract at another place, he delegates the performance of his duty to provide a safe place of work to the occupier and is responsible for any failure of the occupier to perform it.

[PEARCE L.J. The idea of a delegation of that sort seems to me to be a pure fiction.]

[PARKER L.J. The master's duty is general, to take all reasonable steps to avoid risk to his servants. For convenience it is often split up into different categories, such as safe tools, safe place of work, or safe system of work, but it always remains one general duty. When dealing with premises the duty is often expressed as one to provide a place of work as reasonably safe as can be made, but the reasonable care which the master must take to fulfil it must vary according to the circumstances of each case.]

It is submitted that the observations of Denning L.J. in the *Christmas* case[16] are an accurate statement of the law; it is the duty of the master to take all reasonable steps to ensure the safety of his men when working in outside premises.

The defendants also failed to provide a reasonably safe system of work. They had no printed safety rules, and the evidence showed that there is obtainable a printed set of safety rules applicable to window cleaners, and that on the railways the printed safety regulations are read out to all the men twice a year. The defendants should also from time to time have issued special warnings regarding sticking windows and unsafe handles, especially to the effect that such windows should be cleaned from the inside first and the handles tested before beginning work outside. They should visit the premises regularly, and in this case should have told the brewery company to put the handles right. *Roberts* v. *Dorman, Long & Co. Ltd.*[17] is further authority for the proposition that if the employer provides no safety appliances, in this case repeated warnings, it does not lie in his mouth to say that they would have been disregarded.

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[16] [1952] 1 K.B. 141, 148.

[17] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

R. Marven Everett Q.C. and *R. C. H. Briggs* for the defendants were not called upon.

C. A.

1958

WILSON
v.
TYNESIDE
WINDOW
CLEANING
Co.

JENKINS L.J. I will ask Pearce L.J. to deliver the first judgment.

PEARCE L.J., after stating the facts. The judge's findings of fact are not seriously challenged. I do not think that any valid criticisms of the judge's findings of fact have been made out. In a long and careful judgment, he dealt with all the relevant facts and all the contentions put forward by the plaintiff. Mr. Waller, in his very fair and careful argument for the plaintiff, bases his contentions on two main grounds: first, that it is the duty of the defendants to provide a place of work as safe as reasonable care and skill can make it. The accident (he says) shows that this place of work was not safe. That duty is always on the defendants, whether delegated or not, as is shown by the case (in particular) of *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[1] He relies on *Biddle* v. *Hart*[2] and on a dictum of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ltd.*[3] as showing that the employer's duty of care as to the safety of the place of work extends even to premises over which he has no control; and he argues that the decisions in *Taylor* v. *Sims & Sims*[4] and *Cilia* v. *H. M. James & Sons*[5] are wrong in so far as a contrary view was taken. On the basis that the responsibility for providing a safe place of work remains on the master even though he has no control of the premises, Mr. Waller contends that at the least a preliminary inspection to ascertain the dangers is available to the master and that in this case the defendants were negligent in not so inspecting and in not providing a safe place of work for the plaintiff.

Further, in respect of premises out of the master's control Mr. Waller argues that the duty of providing safe premises is, as it were, delegated by the master to the occupier. The master is thus vicariously liable for the occupier's failure to provide safe premises. It is true that, if one can import such a notional delegation, that further argument would stand. But such a delegation necessitates a fiction which seems to me to have no justification in fact. The tradesman comes to the premises to do something to them. He does not thereby delegate to the owner something which he himself has no right to do and with which he has never been concerned.

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[1] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[2] [1907] 1 K.B. 649; 23 T.L.R. 262.

[3] [1952] 1 K.B. 141, 148; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39 (affirmed sub nom. *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180; [1952] 2 All E.R. 1110).

[4] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[5] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

Mr. Waller's second point, as additional or alternative, is that the defendants failed in their duty to take steps to provide a system which would protect the plaintiff from the danger which caused his accident. A proper system (in his contention) would necessitate first an instruction to the plaintiff that a window with only one handle must be opened from the inside; secondly, a regular inspection by an overseer to see how the work was going and to emphasize the necessity for safety precautions; thirdly, a specific warning of the danger of trusting to handles on windows, a warning which should be repeated, say, twice a year, even though the danger was known to the plaintiff—Mr. Waller instanced certain railway regulations that, though known to the men, have to be read to them twice a year as a reminder of things which, though well known, are apt to escape their attention or to be treated lightly—and fourthly, that the master should have told the occupier to put the premises in order.

The judge dealt with the first contention (as to the duty to provide a safe place of work) as follows. First he reminded himself of the well-known dictum of Lord Herschell in *Smith* v. *Baker & Sons* [6]—that the duty of the employer is to take reasonable care to provide proper appliances and to maintain them in proper condition and so to carry out his operations as not to subject those employed by him to unnecessary risk. He dealt with the passage in the judgment of Denning L.J. in the window-cleaning case of *Christmas* v. *General Cleaning Contractors Ltd.*[7] to which I have referred. That passage reads as follows: "The next question "is whether the contractors are liable to their workman, the "plaintiff. Mr. Nelson, for the contractors, argued that employers "who send their men out to work on the premises of other "people have no responsibility for the safety of those premises, "and he cited *Taylor* v. *Sims & Sims* [8] in support of that proposi"tion. He said that it was for the occupier to see that the premises "were safe for the workman and not for the employer to do so. I "cannot agree with that proposition. Until recently many people "thought that an occupier was bound to use reasonable care to "see that his premises were safe for workmen he invited on to

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[6] [1891] A.C. 325, 362; 7 T.L.R. 679.

[7] [1952] 1 K.B. 141, 148.

[8] (1942) 58 T.L.R. 339.

"them: but that is no longer true. The decision of the House "of Lords in *London Graving Dock Co. Ltd.* v. *Horton* [9] shows "that an occupier can allow his premises to remain defective and "dangerous with impunity so long as he gives the men warning "of the risk, or the danger is so obvious that they must be aware "of it. If this is so, I think it must follow that it is for the "employer, who sends his men to the premises, to take reasonable "care to see that the premises are safe for the men or else take "proper steps to protect the men from the dangers to which he "sends them."

The Lord Justice was in effect saying that *Horton's* case [10] had left a gap which must be filled by imposing on the employer a liability for dangers for which the invitor might no longer be liable. The judge observed that the other members of the Court of Appeal had based their judgments on somewhat different grounds and that in the House of Lords the decision in the plaintiff's favour [11] was based on a shortcoming in the system employed to clean the windows rather than a failure to inspect the windows before each periodical cleaning. He then referred to *Cilia* v. *H. M. James & Sons* [12] and *Taylor* v. *Sims & Sims*,[13] in each of which cases the judges held that where an employer sent out his men to work on the premises of others there was no duty of care on him in respect of those premises and that, if there were, the duty had, on the particular facts of each case, been discharged. He also referred to *Hodgson* v. *British Arc Welding Co. Ltd.*,[14] in which Hilbery J. dealt with a similar point in a somewhat different and, as it seems to me, a preferable way. The implications of his judgment are not that the employers had no duty at all in respect of things over which they had no control but that the discharge of that duty was of a wholly different kind from that where the master was in control.

The judge then continued as follows: "There is no evidence "before me of any practice of window cleaning employers to "inspect premises in detail before each periodical cleaning of "the windows. Nor would Davis—a surveyor called for the "plaintiff—go further than to say that employers should go around "while the work was on 'to keep an eye on the men and see how "'the job was shaping.' I think it would be placing too heavy a "burden upon employers to say that they must inspect in detail

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[9] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[10] [1951] A.C. 737.

[11] [1953] A.C. 180; [1952] 2 All E.R. 1110.

[12] [1954] 1 W.L.R. 721.

[13] 58 T.L.R. 339.

[14] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

"all the premises where their men clean windows every time the "men do so and before they do so. Some premises contain "so many windows that before the last window was inspected "some new defect might have developed in the first; for example, "a broken sashcord, and the work of inspection might be endless. "And without in any way minimizing the risks of the job, I think "they can be met in other ways. If men are properly taught "their job; are provided with proper equipment; are adequately "warned of the dangers, and are instructed that they should "not clean any windows which appear to them to be too "dangerous to clean, but should report the matter back to the "employer, then it seems to me to be unnecessary to lay down "that the employer must in addition inspect every window "beforehand."

The judge then went on to deal with the case of *Thomson* v. *Cremin*,[15] on which the plaintiff relied before him and relies before us. In that case a stevedore succeeded against a shipowner, as invitor, in respect of a faulty shoring that injured the plaintiff. The shoring had been installed by competent shipwrights in Australia who were independent contractors, and a Government certificate had been issued to the effect that the regulations had been duly complied with. The shipowner, on the same reasoning as that in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[16] was held vicariously liable to an invitee for the default of the independent contractors. The plaintiff in this case sought to say that since a master owes an even higher duty to a servant than an invitor to an invitee, then a master must a fortiori owe a duty to a servant to see that the premises are safe before sending his workman to work on someone else's premises. But, as the judge pointed out, this very argument had failed in that case, since the plaintiff had sued his master as well as the shipowner but had failed against his master. The judge referred to the words of Lord Simon and Lord Wright in that case. Lord Simon said[17]: "Here, again, I agree with the view of the Scottish courts that "it was not proved to be part of the regular practice or course of "duty of stevedoring firms to make such inspection."

The judge then considered the duty to make this particular handle safe, and decided that since it was not within the power of the defendants to do so and they had not the necessary control over the premises it could hardly be unreasonable not to do so.

[15] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[16] [1938] A.C. 57.

[17] Ibid. 107.

He concluded, on this point, "The defendants in fact met the "situation in this case by telling the plaintiff, a very experienced "man, that he need clean no window which he considered unsafe. "I hold that there was no obligation upon the defendants to go "further and make good the defective handle. The duty of an "employer to take reasonable care to provide a safe place of work "relates, in my view, only to that place of work which is in the "employer's occupation or over which he is shown to have the "necessary degree of control. This is not true of the premises "in the present case."

The judge then dealt with the defendant's alleged failure to warn the plaintiff of that which he already knew, namely, the danger of pulling on handles, and with the failure to give periodically repeated warnings in order to keep his caution vigilant, and decided that there was no negligent failure in that respect. He commented on the fact that there was no evidence of any practice in the trade with regard to repeated warnings. He differentiated between this case and cases where risks are "insidious and "unseen," such as dermatitis cases, where, for instance, it might be that reminders as to the use of barrier cream and suchlike precautions were necessary; and he pointed out that in any event it was pure guesswork as to whether, if there had been periodic warnings, this accident would have been avoided. He found, therefore, that the defendants had not been negligent.

Now it is true that in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[18] Lord Wright divided up the duty of a master into three main headings, for convenience of definition or argument; but all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk. Whether the servant is working on the premises of the master or those of a stranger, that duty is still, as it seems to me. the same; but as a matter of common sense its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. But if a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap. Between these extremes are countless possible examples in which the court may have to decide the question of fact: Did the master take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk? Precautions dictated by reasonable care when the servant works on the master's premises may be wholly prevented or greatly circumscribed by the fact that the place of work is under the control of a stranger. Additional safeguards intended to reinforce the man's own knowledge and skill in surmounting difficulties or dangers may be reasonable in the former case but impracticable and unreasonable in the latter. So viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes merely one of the ingredients, albeit a very important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable care.

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[18] [1938] A.C. 57, 78.

That, as it seems to me, is the reasoning of this court in *Biddle* v. *Hart*.[19] In that case a stevedore's workman, whilst engaged in unloading a ship, was injured owing to a defect in the tackle, and he was suing his master. The judge withdrew the case from the jury, on the ground that the stevedore was not responsible for a defect in the ship's tackle because the tackle did not belong to him. Lord Gorell said [20]: "In my opinion, if the "employer uses plant which is not his own for the purpose of "doing something which he has engaged to do, it cannot possibly "be said that he has no duty whatever in relation to that plant. "Otherwise he would be able to take anything that came from "anybody and to use anything in the work he was engaged upon "without making any inquiry at all, and then say, in the event "of an injury arising from a defect in the plant, that he had "nothing to do with it, and so escape liability. That, to my "mind, is unreasonable, and is not consistent with the second "section. What I take to be the meaning of that is that if the "employer uses plant which does not belong to him, he may have "a duty in regard to the persons employed to take reasonable "care to see that it is proper for the purpose for which it is used. "It may be that in a case of this character, although he had that "duty, yet, if he had dealt with these shipowners before and had "never had any cause for complaint, the jury might think that "he had reasonably discharged that duty. On the other hand, "when you have evidence that the plant was old and had been "in use for a long time, the jury might say they were not satisfied "that reasonable care had been taken to see that it was in a

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[19] [1907] 1 K.B. 649.

[20] Ibid. 653.

"proper condition. Once establish the duty, the question is, "What would the jury consider a discharge of that duty?"

As Parker L.J. pointed out in *Davie* v. *New Merton Board Mills Ltd.*,[21] that reasoning seems inconsistent with the two decisions to which I have referred, which say that there is no duty of care in respect of premises over which the master has no control, but it is consistent with the alternative ratio in each case that the duty had been discharged. It is consistent, I think, with the implications of the judgment of Hilbery J. in *Hodgson* v. *British Arc Welding Co. Ltd.*[22] But applying that reasoning to this case, I think that the plaintiff has not shown that the defendants failed to take reasonable steps for the safety of the plaintiff.

The judge's reasoning seems to me to be sound. It was a question of fact whether the defendants were negligent; and I see no ground for differing from the conclusions of fact which the judge reached.

I would dismiss the appeal.

PARKER L.J. I agree. I have no doubt that this appeal fails. It is only out of respect for Mr. Waller's persuasive argument that I add anything. The first way in which he puts his case is this. It is, he says, the master's duty to provide a place of employment as safe as the exercise of reasonable skill and care will permit. Quite clearly, the premises in this case where the plaintiff was to work were not as safe as the exercise of reasonable skill and care would permit; therefore, as the duty is personal, the defendants are liable; and that is so, whether the premises are in the occupation of the defendants or (as here) of people who are neither servants nor agents, nor independent contractors employed by the defendants.

I think that this case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties. Thus, it is often said (as it is said in this case) that the master owes a duty to make the place of employment as safe as reasonable skill and care will permit. Again, it is said that it is the master's duty to make the plant and tools as safe as reasonable skill and care will permit; and again it is said that it is the master's duty to devise and lay down a safe system of working.

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[21] [1958] 1 Q.B. 210, 242; [1958] 1 All E.R. 67.

[22] [1946] K.B. 302.

Approached in that way, questions at once arise as to whether, and if so to what extent, any of those duties extend (in the case of premises) to premises not occupied or controlled by the master, or (in the case of plant and tools) to plant and tools bought from responsible and reputable suppliers or manufacturers—bearing in mind, as has been laid down so often, that in each case the duty is a duty personal to the employer, in the sense used in *Wilsons'* case.[23] It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in *Smith* v. *Baker & Sons*,[24] to take reasonable care so to carry out his operation as not to subject those employed by him to unnecessary risk.

That general duty applies in the circumstances of every case; but the governing words "reasonable care" limit the extent of the duty in the circumstances of each case. Accordingly, the duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party, or whether the tool has been made to the order of the master or his manager, servant or agent, or is a standard tool supplied and manufactured by reputable third parties; but what reasonable care demands in each case will no doubt vary.

That, as it seems to me, is the true principle, and is consistent with the decision of this court in *Biddle* v. *Hart*.[25] As I said in *Davie* v. *New Merton Board Mills Ltd.*,[26] I very much doubt whether the decisions in *Taylor* v. *Sims & Sims* [27] and *Cilia* v. *H. M. James & Sons* [28] are correct decisions in so far as they said that in circumstances such as these there is no duty in respect of the safety of the premises. It seems to me also that those statements are inconsistent with a passage in the speech of Lord Wright in *Thomson* v. *Cremin*.[29]

Mr. Waller relied strongly on the dicta of Denning L.J. in the case of *Christmas* v. *General Cleaning Contractors Ltd.*[30]; but in my judgment those were dicta, and in so far as Mr. Waller said that those remarks implied that there was a duty to make premises in the occupation of a third party safe, I do not think

[23] [1938] A.C. 57.

[24] [1891] A.C. 325, 362.

[25] [1907] 1 K.B. 649

[26] [1958] 1 Q.B. 210, 242.

[27] 58 T.L.R. 339.

[28] [1954] 1 W.L.R. 721.

[29] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[30] [1952] 1 K.B. 141, 148.

that they can stand with the decisions to which I have referred. Bearing that in mind, it seems to me that there is nothing in this case on which one can say that the general duty, so far as it relates to premises, has been broken.

One can conceive cases of a very old, dilapidated building, or a building which is known to have suffered war damage or is dilapidated in some other respect, where one could say that it was the duty of an employer to see that it was made safe or, if it could not be made safe, if necessary to forbid his workmen to go there and work. But there is no suggestion of that in the present case.

So much for Mr. Waller's first contention. His second contention is based on an allegation that in various respects there has been a breach of the sub-division of the duty which relates to an unsafe system of working. I think this must be right: that in so far as what one may call the first division, the making the premises safe, cannot be fully performed—as when they are in the possession of a third party, it behoves the master to exercise all the more care in regard to his system of working.

In regard to the system of working, various points are taken. It is said first that it was the duty of the master, albeit that he could not make the premises safe, to inspect them, either each time the workmen went on the job, or at any rate twice a year in the course of a contract such as this. That, of course, overlaps to some extent what I have already said in regard to the first contention; but in so far as it is based on an unsafe system of working, it seems to me that the answer here is that there is no suggestion that there is any practice in the trade in that regard. No doubt a master will inspect the premises generally with a view to estimating for the job in the first instance; but there is no practice in the trade whereby he must make a periodic inspection.

Secondly, it is said that reasonable care demanded in this case that there should be repeated warnings given to the plaintiff of the danger of windows sticking and of handles coming off. In fact in the present case there not only has been no repeated warning, but no initial warning. But the circumstances here are these: this is a man who was 56 years of age, I think, at the time, and who has been all his life a window cleaner: he is a very experienced man, usually acting as a charge-hand, and he knew —and he frankly said that he knew—of the dangers involved, of handles coming off. It is said that he should have been told— one witness suggested that it should be impressed upon him twice a year—again and again. For my part, I would like to adopt entirely what Donovan J. said on that point. It seems to me

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that the disadvantages of doing that in the case of skilled men of this sort may well outweigh the advantages; and for my part I cannot think that "reasonable care" demands a repeated warning to skilled men in a case at any rate such as this, where the dangers involved are patent. It is not a case that one sometimes comes across of the danger of silicosis from particles of dust which are quite invisible and cannot be seen. I do not know, but it may well be that in such cases "reasonable care" would demand that the employer should warn and exhort the men constantly to wear masks. But there, as I have said, the danger is not patent.

Lastly, it is said (and for my part I think that this is the strongest way that Mr. Waller can put his case) that there ought to have been general instructions that in the case of all sash windows men should clean them from the inside first and, while inside, should see that the top sash will come down—in other words, that it is not stuck; and that in the case of a window the handles of which are suspect it is actually opened while the men are inside. That, however, was a suggestion made by only one witness, who I do not think had any experience of window cleaning whatsoever. There is no suggestion that there is any settled practice in the trade for the giving of such instructions. Accordingly, one would have to say (adopting the words so often used) that it would have been folly on the part of a prudent employer not to give such instructions. For my part, I am quite unable to say that in that regard the plaintiff has made out his case.

For these reasons, as well as the reasons given by my Lord, would dismiss this appeal.

JENKINS L.J. I entirely agree, and find nothing I can usefully add.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co. for Hadaway & Hadaway, Newcastle-upon-Tyne; Barlow, Lyde & Gilbert.*

F. R. D.

HAMZEH MALAS & SONS *v.* BRITISH IMEX INDUSTRIES LTD.

C. A.

1957
Dec. 10.

Jenkins, Sellers and Pearce L.JJ.

Sale of Goods—C.I.F.—Letter of credit—Right to stop—Contract for delivery by two instalments—Payment by letter of credit for each instalment—First instalment alleged to be defective—Repudiation of contract by plaintiff purchasers—Application for injunction "freezing" second letter of credit—Jurisdiction of court—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 31 (2).
Banking—Letter of credit.
Injunction.

The plaintiffs, a Jordanian firm, contracted to purchase from the defendants, a British firm, a large quantity of reinforced steel rods, to be delivered in two instalments. Payment was to be effected by the opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realized by the defendants on the delivery of the first instalment. The plaintiffs complained that that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan J. refused the application. The plaintiffs appealed:—

Held, that although the court had a wide jurisdiction to grant injunctions, this was not a case in which, in the exercise of its discretion, it ought to do so; an elaborate commercial system had been built up on the footing that a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which imposed upon the banker an absolute obligation to pay, irrespective of any dispute there might be between the parties whether or not the goods were up to contract.

APPEAL from Donovan J.

The plaintiffs, Hamzeh Malas and Bochir Hamzeh Malas, a Jordanian firm trading as Hamzeh Malas & Sons, contracted to purchase from the defendants, British Imex Industries Ltd., a large quantity of reinforced steel rods. The goods were to be delivered in two instalments and payment was to be effected by means of two confirmed letters of credit with the Midland Bank in London—one in respect of each instalment. The letters of credit were duly opened and the defendants realized the first one and would shortly be in a position to realize the second payment. Further details of the transaction appear from the report of *British Imex Industries Ltd.* v. *Midland Bank Ltd.*[1]

On December 9, 1957, the plaintiffs, alleging that the goods of the first instalment were defective, applied ex parte to Donovan J.

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[1] [1958] 1 Q.B. 542; [1958] 1 All E.R. 264.

asking for an injunction to restrain the defendants, their servants, agents or assigns or anyone deriving title under them, from drawing on the second letter of credit for £23,000 or receiving from the Midland Bank any money under the contract. Donovan J. granted the injunction, to run until 2.30 p.m. on the following day, December 10. The defendants had until 3 p.m. on that day to present the letter of credit to the Midland Bank and to receive payment. On the morning of December 10 the plaintiffs applied to Donovan J. to extend the injunction until the rights of the parties under the contract for the sale of the goods could be ascertained. The judge refused to do so on the ground that he had no jurisdiction. The plaintiffs immediately appealed to the Court of Appeal at 12.30 p.m. against that refusal.

Gerald Gardiner Q.C. and *J. Fox-Andrews* for the plaintiffs. The court has wide powers, in the exercise of its discretion, to grant an injunction to restrain the defendants from dealing with the amount of this letter of credit: see R.S.C., Ord. 50, r. 6. The defendants have already received some £23,000 under the first letter of credit in respect of worthless goods, under a contract which the plaintiffs are entitled to repudiate and have repudiated. The plaintiffs are not seeking to withdraw money from the Midland Bank, but merely to restrain the defendants from realizing the credit, subject to any terms which the court sees fit to impose. The bank will remain under the same liability. [They referred to section 31 (2) of the Sale of Goods Act, 1893, and cited *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd.*[2]]

A. A. Mocatta Q.C. and *Mark Littman* for the defendants. While not admitting the jurisdiction of the court to grant an injunction, if the application be granted the whole procedure by which, in commercial transactions, letters of credit are used, would be wrecked. The defendants have a contract with the bank that if they present the proper documents the bank will pay. That is the whole basis on which the English exporter agrees to sell to overseas purchasers. The bank has no right to refuse payment on presentation of the proper documents. [*Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[3] was cited. Davis' Law Relating to Commercial Letters of Credit, 2nd ed., pp. 70 to 76, and Gutteridge's Law of Bankers' Commercial Credits, 2nd ed., pp. 35 to 37, were read.]

[2] [1934] 1 K.B. 148; 50 T.L.R. 58.

[3] [1952] 1 K.B. 285; [1952] 1 All E.R. 89.

JENKINS L.J. stated the facts and continued: It appears that when the first consignment of steel rods arrived they were, according to the plaintiffs, by no means up to contract quality and many criticisms were made on that score. That is a matter in issue between the parties. In the meantime the plaintiffs wish to secure themselves in respect of any damages they may be found to be entitled to when this dispute is ultimately tried out, by preventing the defendants from dealing with this outstanding letter of credit. Mr. Gardiner, in effect, treats this as no more than part of the price, a sum earmarked to pay for the goods bought under the contract, which the plaintiffs have become entitled to repudiate; and he says that the defendants ought, accordingly, to be restrained from dealing with the amount of this letter of credit. He points out that he is not seeking any order against the bank, but merely against the defendants.

We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

There is this to be remembered, too. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, furthermore, to be observed that vendors are often reselling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is—and I think it was followed by the defendants in this case—to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of "freezing," if I may use that expression, the sum in respect of which the letter of credit was opened.

I agree with Mr. Gardiner that this is not a case where it can be said that the court has no jurisdiction to interfere. The court's jurisdiction to grant injunctions is wide, but, in my judgment, this is not a case in which the court ought, in the exercise of its discretion, to grant an injunction. Accordingly, I think this application should be refused.

SELLERS L.J. I agree, but I would repeat what my Lord has said on jurisdiction. I would not like it to be taken that I accept, or that the court accepts, the submission if it was made, as I think it was, that the court has no jurisdiction. There may well be cases where the court would exercise jurisdiction as in a case where there is a fraudulent transaction.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *Simmons & Simmons; Menasse & Tobin.*

A. W. G.

1958
Feb. 3, 4.

Diplock J.

IAN STACH LTD. *v.* BAKER BOSLEY LTD.

[1957 I. No. 1589.]

Sale of Goods—F.O.B.—Payment—Confirmed credit—Provision for shipment during specified period—Exact shipping date to be chosen by buyer—Buyer's delay in making credit available—Date by which credit to be opened.

Damages—Sale of goods—String contract—Failure to provide letter of credit—Loss of profit.

Contract—Repudiation—Waiver—Letter calling on other party for "immediate performance"—Acceptance later of repudiation.

In a contract for the sale of goods f.o.b. which provides for shipment over a period within which the buyer is entitled to call for the shipment of the goods at any time, and which is financed by a banker's confirmed irrevocable credit, the prima facie rule is that the credit must be opened by the buyers at the latest by the first day of the shipment period.

A contract for the sale of ship plates to be delivered f.o.b. Benelux port for shipment to Canada "August–September, 1956" provided for payment by confirmed irrevocable credit. The buyers were responsible for shipping arrangements and for choosing the exact shipment date. They failed to open the credit either by the time the shipment period started or by August 8 when the sellers called for it to be opened immediately; and on August 14 the sellers informed them that they would be held responsible for the consequences. The buyers never in fact opened the credit and towards the end of the shipment period the sellers, after consultation with the buyers, sold the goods elsewhere but at a price lower than the contract price. In an action by the sellers for damages for breach of contract:—

Held, that it was the duty of the buyers to establish the credit by August 1, 1956, at the latest, and that although the sellers had waived their right to treat the contract as repudiated by reason of their failure to do so until such time had elapsed after August 8 as could be regarded as "immediately," on August 14 the sellers had accepted the buyers' breach as repudiation of the contract as they were entitled to do and were entitled to damages.

Pavia & Co., S.P.A. v. *Thurmann-Nielsen* [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492 applied.

Sinason-Teicher Inter-American Grain Corporation v. *Oilcakes and Oilseeds Trading Co. Ltd.* [1954] 1 W.L.R. 1394; [1954] 3 All E.R. 468 considered.

ACTION.

In July, 1956, the plaintiffs, Ian Stach Ltd., steel merchants, contracted with the defendants, Baker Bosley Ltd., for the sale to them of 500 metric tons of ship plates of West German origin at the price of 205 dollars per metric ton. Both parties were middlemen under a string of contracts. The plaintiffs, while negotiating the contract with the defendants, at the same time entered into a contract with their suppliers, Amalgamated Exporters (Steel and Machinery) Ltd., for the purchase of 600 metric tons of ship plates at 190 dollars per metric ton, of which the 500 tons to be sold to the defendants was to form a part. The contract between the plaintiffs and the defendants was signed on July 10, 1956, and provided for the goods to be delivered f.o.b. Benelux port (probably Amsterdam/Rotterdam), destination Canada. Delivery was to be August/September, 1956, and payment by confirmed irrevocable letter of credit divisible and transferable and assignable to the plaintiffs' nominees in Western Germany. The plaintiffs undertook to establish a 2 per cent. performance bond immediately they received a pre-advice from the defendants' bank that the letter of credit was being established. In a letter of July 12, 1956, the plaintiffs informed the defendants that delivery would be made by their suppliers to Rotterdam or Amsterdam as the defendants required; that it was the defendants' responsibility to obtain shipping space; that calling forward instructions should be sent as soon as possible; and that they were urgently awaiting either a pre-advice from the defendants' bank that the credit was being established or else the actual credit itself. The defendants, however, who were experiencing difficulty in obtaining a letter of credit from their own buyers, failed to establish the credit. In a letter of August 8, 1956, the plaintiffs requested the defendants "to open immediately your letter of credit covering this order, as the mills are "pressing us for this most energetically." As the defendants still failed to do so, the plaintiffs informed them on August 14 that as they had failed to adhere to the conditions of the contract they would be held responsible for the consequences. In the events which happened the defendants never in fact opened the letter of credit in favour of the plaintiffs.

Early in September consultations took place between the plaintiffs and the defendants with a view to finding an alternative market for the goods, and on September 14 the plaintiffs found a purchaser, a Swiss company, for goods of a similar character but at the lower price of 194 dollars per metric ton. They informed the defendants accordingly. At the time the defendants made no inquiries about the price obtained for the goods, but on September 24 they informed the plaintiffs that as they had not been communicated with before the goods were disposed of they assumed that the price obtained by the plaintiffs was such as to absolve the defendants from liability. The plaintiffs replied that they reserved their rights against the defendants.

In this action the plaintiffs sued the defendants for £1,964 as damages for breach of contract. They claimed that it was a term to be implied in the contract that the defendants would establish the letter of credit not later than August 1, 1956, or, alternatively, forthwith upon being thereafter called on to do so; and that the defendants had committed a breach of that term by failing to establish the credit either by August 1, 1956, or by August 8, when they were called upon to do so, or at all. Further, or alternatively, they contended that the defendants evinced an intention no longer to be bound by the contract; that they were at all material times unable to open the letter of credit, and that they accepted the defendants' conduct and/or their inability as a wrongful repudiation of the contract.

The defendants denied any implied term that the letter of credit would be opened by them by August 1, or when called upon to do so by the plaintiffs. They contended that it was an implied term that they would establish the letter of credit in such time as to allow the plaintiffs to make delivery on or before September 30, 1956, to the ship or ships selected by the defendants and that the defendants were entitled to establish the letter of credit on September 23 and certainly after September 14. They contended that if there were such an implied term as contended for by the plaintiffs it was waived. They admitted that the letter of credit was not opened but denied that they were unable to do so or that they evinced an intention not to be bound by the contract. They also contended that by contracting to sell the goods elsewhere during the subsistence of the contract the plaintiffs had evinced an intention not to perform the contract.

Michael Kerr for the plaintiffs. This case turns on the defendants' failure to open the credit in favour of the plaintiffs as required by the contract. They never in fact opened it and were therefore throughout the whole shipment period in breach of their obligation to do so. Had this been a c.i.f. instead of an f.o.b. contract, this case would never have come to court, for there is clear authority that in c.i.f. contracts the obligation of the buyer is to open the letter of credit by the beginning of the shipment period: *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen.*[1] In *Plasticmoda Societa Per Azioni* v. *Davidsons* (*Manchester*) *Ltd.*[2] the Court of Appeal assumed that the decision in *Pavia's* case[3] applied to f.o.b. contracts: see *per* Denning L.J.[4] That case concerned f.o.b. contracts in which there were actual shipment dates, not a shipment period, but it was conceded that the letter of credit should have been opened a reasonable time before the first shipment date. The case went off on waiver, but this court should regard itself as bound by it.

It cannot be said that because a contract is an f.o.b. contract certain consequences must invariably follow. There are different types of f.o.b. contracts, but all must depend on co-operation between the parties during the shipment period. As to the nature of an f.o.b. contract, see *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*, *per* Devlin J.[5]; *N. V. Handel My. J. Smits Import-Export* v. *English Exporters* (*London*) *Ltd.*, *per* McNair J.[6]; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[7]; *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster Ltd.*[8] and *Dix* v. *Grainger.*[9]

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[1] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492.
[2] [1952] 1 Lloyd's Rep. 527.
[3] [1952] 2 Q.B. 84.
[4] [1952] 1 Lloyd's Rep. 527, 538.
[5] [1954] 2 Q.B. 402, 424; [1954] 2 All E.R. 158.
[6] [1957] 1 Lloyd's Rep. 517, 519.
[7] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.
[8] [1955] 1 Lloyd's Rep. 303.
[9] (1922) 10 Ll.L.Rep. 496.

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As to the nature of payments by letter of credit, see *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Co. Ltd.*[10] and *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.*[11] A term in any contract of sale that payment is to be made by letter of credit is much more than a mode of payment. It is analogous to a bank guarantee that the seller will be paid, and where the seller is a merchant he will rely on the letter of credit to enable him to get the goods from his suppliers. The latter applies to the facts of this case and the court must imply a term as to the date when the credit was to be established. The duty of the defendants was to open the credit a reasonable time before the beginning of the shipment period. Reliance is placed on the judgment of Devlin J. in *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Co. Ltd.*[12] in support of that proposition. What was intended here was that the sellers should have the security of the letter of credit and the buyers should have the security of the performance bond. The proper implication in this case is that the credit should be established, if not before, then not later than the first date of the shipment period. There are intrinsic features in the contract which point to that conclusion and, in addition, the conduct of the defendants can be relied on to show where they thought their duty lay: see *A. V. Pound & Co. Ltd.* v. *M. W. Hardy & Co. Inc.*, *per* Viscount Simonds.[13]

Finally, if the defendants were not obliged to move in this matter, either before or by the beginning of the shipment period, they were obliged to do so and to open the credit immediately upon being asked to do so. That request was made to them on August 8, but it was never complied with.

Neil Lawson Q.C. and *John Lloyd-Eley* for the defendants. This is a classic f.o.b. contract under which the buyers have the right to select the port of shipment and to call the goods forward at any time during the named shipment period. It follows that their obligation, so far as the credit is concerned, is to open it in sufficient time to enable the goods to reach the port of shipment and to be shipped within the shipment period. The cases as to the nature of f.o.b. contracts cited by the plaintiffs are distinguishable on their facts. On analysis they are all cases where the classic form of f.o.b. contract is departed from and where there are special circumstances which make it necessary for the credit to be opened by a specified date, or in advance of shipment, because of special arrangements as to the shipment of the goods. In *Plasticmoda Societa Per Azioni* v. *Davidsons (Manchester) Ltd.*[14] there was no specified shipment period but an actual date of shipment, and therefore the dicta relied upon by the sellers, which in any case were obiter, cannot be automatically applied to a case such as the present where there is a shipment period. In *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[15] it appears to have been a term of the contract that the credit should be opened forthwith, and therefore the reasoning in that case cannot be applied to the present case where there is no such term. In *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster Ltd.*[16] there were very special facts, for the contract provided for the credit to be opened within a few weeks of the placing of the order although delivery was not to take place until some eight months thereafter. In *N. V. Handel My. J. Smits Import-Export* v. *English Exporters (London) Ltd.*[17] the sellers and not the buyers were responsible for the shipping arrangements. The report of *Dix* v. *Grainger*[18] is too brief to be of any assistance.

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[10] [1954] 1 W.L.R. 935; [1954] 2 All E.R. 497; [1954] 1 W.L.R. 1394; [1954] 3 All E.R. 468.

[11] Ante, 127; sub nom. *Malas* v. *British Imex Industries Ltd.* [1958] 1 All E.R. 262.

[12] [1954] 1 W.L.R. 935, 941.

[13] [1956] A.C. 588, 606; [1956] 1 All E.R. 639.

That the present is a classic f.o.b. contract is borne out by the contractual documents. As a consequence it is submitted that the buyers have a reasonable time after the beginning of the shipment period within which to open the letter of credit. That must be the prima facie rule, because the buyers have until the end of the shipment period in which to take delivery, and the general principle is that delivery and payment take place at the same time.

The authorities relating to c.i.f. contracts relied on by the plaintiffs are not applicable in the case of f.o.b. contracts because the two types of contract are not analogous. In a c.i.f. contract with a shipment period the seller has the right to fix the date of the shipment. On the authorities, the credit must be established by the first day of the shipment period because the seller must be covered for the price of the goods and the obligations in respect of freight and insurance into which he has to enter; but the plaintiffs here have been unable to show any authority, except in relation to contracts on special terms, which indicate that the position is the same under an f.o.b. contract. It cannot be the

[14] [1952] 1 Lloyd's Rep. 527.
[15] [1952] 2 Q.B. 297.
[16] [1955] 1 Lloyd's Rep. 303.
[17] [1957] 1 Lloyd's Rep. 517.
[18] 10 Ll.L.Rep. 496.

same. Both from the point of view of time of payment and time of delivery there is a difference between the two types of contract. There can be no magic in letter of credit arrangements which can put a buyer under an f.o.b. contract under an obligation to find the money due from him a substantial time ahead of the date when he wishes to exercise his right to take delivery of the goods.

The submission that the credit should be established a reasonable time before the first day of the shipment period is not supported by authority; in principle it would be wrong, where there is no specific term in an f.o.b. contract as to when the credit is to be opened, that an obligation should rest on the buyer to open it before the shipment period had actually begun. There is nothing in the specific terms of this contract to make any departure from the general principle applicable to f.o.b. contracts valid.

The plaintiffs' argument that the defendants were under an obligation to open the credit, if not before the first day for shipment, then immediately upon demand by them, turns on an implied term in the contract. If it be right that the obligation under the contract was only to impose an obligation to open it within a reasonable time during the shipment period, the plaintiffs were not entitled to vary that obligation. Further, on the evidence, the plaintiffs were conducting themselves in such a way as to waive the obligation on the defendants, if any existed, to open the credit before September 5. If there was a subsisting contract on that date it came to an end when the plaintiffs purported to sell the goods to the Swiss company. At the time of that sale the defendants had committed no breach entitling the plaintiffs to rescind and had made no intimation that they did not intend to perform the contract.

Michael Kerr in reply. As to the implied term in the contract, it is clear from the evidence that all down the chain the parties expected this credit to be opened by August 1, 1956, the beginning of the shipment period. The conditions here are the same as in *Pavia's* case [19] and in *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Co. Ltd.*[20] The *Trans Trust* case [21] suggests that the prima facie rule as to the opening of a credit under an f.o.b. contract, having regard to its nature and its benefits to the seller, is that the seller is entitled to have it before the beginning of the shipment period so that

[19] [1952] 2 Q.B. 84.

[20] [1954] 1 W.L.R. 1394.

[21] [1952] 2 Q.B. 297.

he should have the guarantee of knowing that the money will be paid: see, in particular, *per* Denning L.J.[22] The defendants' submission that it has only to be made available during the shipment period within a reasonable time of the buyer's request to the seller to deliver the goods on board is just as unworkable as the submission made by Mr. Widgery was in the *Pavia* case[23]: see *per* Somervell L.J.[24] That argument must fall to the ground because the buyer does not know what a reasonable time would be either at the date of the contract or at any other time, because this must depend upon circumstances affecting the seller which will or may be unknown to the buyer. There is a prima facie rule that in f.o.b. contracts with a shipment period the credit must be established at a time known to both parties in advance, that is, by the first date of the shipment period, (1) because that is certain, (2) because on the authorities cited it is a fair and sensible rule, and (3) it is what the parties intended. It would be unsatisfactory on the basis of correspondence in a particular case to lay down as a matter of law that the prima facie rule is different in c.i.f. and f.o.b. contracts. It is submitted that the rule is exactly the same.

If it be right that the credit should here have been established not later than August 1, 1956, or, alternatively, if the plaintiffs did not insist on strict performance of that obligation, by August 8, which was the date when they asked for it to be opened immediately, then the failure to establish the credit by the right time was not an anticipatory breach but a final breach of the contract, and therefore the position thereafter was that both parties were engaged in processes of mitigation. The plaintiffs' letters to the defendants were not consistent with repudiation. It is submitted that there was no waiver by the plaintiffs of the defendants' obligation to establish the credit and that the plaintiffs are accordingly entitled to succeed. [Reference was also made to *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co. Ltd.*[25]]

DIPLOCK J. This case raises the question: at what time under an f.o.b. contract, where payment is by confirmed credit, must the buyer open the credit? International trade has to an increasing extent over the last 30 or 40 years been financed by bankers' confirmed credits. So much so that the classic f.o.b. and c.i.f. contracts of the textbooks providing for cash or acceptance against documents without the intervention of the banker are now probably the exception rather than the rule; and it is a little surprising that the question which I have to answer in this case is not already the subject of authoritative decision, but it appears that it is not.

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[22] [1952] 2 Q.B. 297, 304.

[23] [1952] 2 Q.B. 84.

[24] Ibid. 87.

[25] (1922) 28 Com.Cas. 42.

The relevant facts are fairly short. Both the plaintiffs and the defendants are merchants dealing in steel, among other metals. As each knew, neither of them was a manufacturer or stockist or a user of steel: they were both middlemen. The sums involved in contracts which they had on hand at any particular time were large, and, as is usual in the trade, beyond their own financial resources. Their method of carrying on business, again usual in the trade, was to enter into practically simultaneous contracts of purchase and sale, and to rely upon the banker's credits opened by the buyers to enable them to pay the purchase price to the person from whom they had in turn bought.

Where, as in the present case, there is a string of merchants' contracts between the manufacturer or stockist and the ultimate user, the normal mechanism for carrying out the various contracts is the familiar one which was intended to be used in this case: the ultimate user, under the terms of his contract of sale, opens a transferable, divisible credit in favour of his seller for his purchase price: his seller in turn transfers so much of the credit as corresponds to his own purchase price to his seller or, more probably, if his own contract with another merchant also calls for a transferable, divisible credit, procures his own banker to issue a back-to-back credit—that is to say, he lodges the credit in his favour with his own banker, who in his turn issues a transferable, divisible credit for the amount of his purchase price to his own seller; and so on, through the string of merchants, until the banker of the last merchant in the string issues the credit in favour of the actual manufacturer or stockist. The reason why they issue fresh credits is that in banking practice a transferable credit is regarded as transferable once only, and, also as is obvious in this sort of trade, it is desired, naturally enough, by any merchant in the string to conceal from his buyer and his seller who his own customer is. That is the way, as both parties to the present transactions knew, in which this type of business is normally carried on.

[His Lordship stated the facts and continued:] On the face of the written contract of July 10, 1956, it may be a matter of doubt as to whose was to be the responsibility for finding shipping space and for determining shipping port and shipping date.

Prima facie, under an f.o.b. contract that is the duty and responsibility of the buyer; but there are probably as many exceptions to the rule as there are examples of it. It appears from a letter of July 11, 1956, that the defendants took the view that at any rate so far as the selection of port was concerned the option to select the port of shipment within the limits of Benelux ports lay upon the sellers. But a letter of July 12, 1956, does in my view make it clear that the final contract (and this letter is one of the contractual documents) became a classic f.o.b. contract in which the buyer had the right and the responsibility of selecting the port, of making arrangements for shipment and choosing the date of shipment.

[His Lordship read the correspondence and continued:] The first question that I have to decide is: When was it the duty of the defendants to open the letter of credit or to forward the banker's pre-advice?—that alternative having been put forward in the letter of July 12, 1956.

As has been pointed out in numerous cases, the commercial purpose of a banker's confirmed credit is more than a mere method of payment: it creates a direct liability upon the banker independent of the contract of sale, and is an undertaking by the banker that if the seller presents the required documents in the required time he will receive payment of the contract price. The commercial importance of this independent undertaking constituted by opening a confirmed credit is illustrated in a recent case in the Court of Appeal—*Hamzeh Malas & Sons* v. *British Imex Industries Ltd.*[1]—where the Court of Appeal refused an injunction to restrain the defendants from making use of the credit. I need merely refer to a passage in the judgment of Jenkins L.J., where he says[2]: " . . . it seems to be plain enough " that the opening of a confirmed letter of credit constitutes a " bargain between the banker and the vendor of the goods, which " imposes upon the banker an absolute obligation to pay, irrespec- " tive of any dispute there may be between the parties as to " whether the goods are up to contract or not. An elaborate " commercial system has been built up on the footing that " bankers' confirmed credits are of that character, and, in my " judgment, it would be wrong for this court in the present case " to interfere with that established practice. There is this to " be remembered, too. A vendor of goods selling against a

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[1] Ante, 127; sub nom. *Malas* v. *British Imex Industries Ltd.* [1958] 1 All E.R. 262.

[2] Ante, 129.

"confirmed letter of credit is selling under the assurance that "nothing will prevent him from receiving the price. That is of "no mean advantage when goods manufactured in one country "are being sold in another. It is, furthermore, to be observed "that vendors are often reselling goods bought from third parties. "When they are doing that, and when they are being paid by a "confirmed letter of credit, their practice is—and I think it was "followed by the defendants in this case—to finance the payments necessary to be made to their suppliers against the letter "of credit. That system of financing these operations, as I see "it, would break down completely if a dispute as between the "vendor and the purchaser was to have the effect of 'freezing,' "if I may use that expression, the sum in respect of which the "letter of credit was opened."

A letter of confirmed credit constitutes a direct undertaking by the banker that the seller, if he presents the documents as required in the required time, will receive payment; and where there is provision that under a contract a confirmed credit is to be provided, then, as was pointed out by Devlin J. in *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Co. Ltd.*,[3] that undertaking from the banker should be obtained before the seller embarks upon those operations which lead directly to the performance of his obligations under the contract.

There is clear authority binding upon me that in c.i.f. contracts the confirmed credit must be opened at latest by the beginning of the shipment period. That was decided by the Court of Appeal in *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen*,[4] where Somervell L.J. said[5]: "I think when a seller is given a right to ship over "a period and there is machinery for payment, that machinery "must be available over the whole of that period"; and Denning L.J. put the matter succinctly in the following words[6]: "The "question in this case is this: In a contract which provides for "payment by confirmed credit, when must the buyer open the "credit? In the absence of express stipulation, I think the "credit must be made available to the seller at the beginning of "the shipment period. The reason is because the seller is entitled, "before he ships the goods, to be assured that, on shipment, he "will get paid. The seller is not bound to tell the buyer the

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[3] [1954] 1 W.L.R. 935, 939; [1954] 2 All E.R. 497.

[4] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492.

[5] [1952] 2 Q.B. 84, 88.

[6] Ibid. 88.

"precise date when he is going to ship; and whenever he does "ship the goods, he must be able to draw on the credit. He "may ship on the very first day of the shipment period. If, "therefore, the buyer is to fulfil his obligations he must make "the credit available to the seller at the very first date when "the goods may be lawfully shipped in compliance with the "contract." That, I think, is as far as the binding authorities upon c.i.f. contracts go.

It is, however, to be observed that in the *Sinason-Teicher* case,[7] in the Court of Appeal, Denning L.J. said this[8]: "We "were referred to *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen.*[9] I "agree with what Devlin J. said about that case. It does not "decide that the buyer can delay right up to the first date for "shipment. It only decides that he must provide the letter of "credit at latest by that date. The correct view is that, if "nothing is said about time in the contract, the buyer must "provide the letter of credit within a reasonable time before the "first date for shipment. The same applies to a bank guarantee: "for it stands on a similar footing."

I think that those observations, although entitled to great respect, are obiter, and they were not necessary for the decision in that case—as indeed appears from the judgment of Devlin J.[10] in the lower court, where he refers to the matter and says it is unnecessary to decide it. Neither of the other Lords Justices appears to me to express any view on the matter.

Those being the cases upon c.i.f. contracts, Mr. Kerr, to whom for his researches among the case law I am much indebted, has drawn my attention to five cases which concern f.o.b. contracts. They are: *Plasticmoda Societa Per Azioni* v. *Davidsons (Manchester) Ltd.*[11]; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[12]; *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster Ltd.*[13]; a cryptic judgment by Bailhache J. in *Dix* v. *Grainger*[14]; and, finally, *N. V. Handel My. J. Smits Import-Export* v. *English Exporters (London) Ltd.*[15] In each of these cases it was either held or assumed that the confirmed credit had to be opened at latest by the shipment date. It does not, however, seem to me that any of them is an authority for Mr. Kerr's proposition. In the *Plasticmoda* case[16] there was a date of shipment fixed—not

[7] [1954] 1 W.L.R. 1394.
[8] Ibid. 1400.
[9] [1952] 2 Q.B. 84.
[10] [1954] 1 W.L.R. 935, 939.
[11] [1952] 1 Lloyd's Rep. 527.
[12] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.
[13] [1955] 1 Lloyd's Rep. 303.
[14] (1922) 10 Ll.L.Rep. 496, 497.
[15] [1957] 1 Lloyd's Rep. 517.
[16] [1952] 1 Lloyd's Rep. 527.

a period of shipment, as in this case. In the *Trans Trust* case [17] the provision was that the letter of credit should be opened forthwith. In the *Smits* case [18] it was not a classic f.o.b. contract in that the seller had the duty and responsibility of fixing the shipping; and in the *Etablissements Chainbaux* case [19] it was rather an exceptional contract, and a manufacturer's contract at that.

The distinction between those cases and the present case is that this is a classic f.o.b. contract in that the buyer is entitled to call for shipment at any time within the shipping period and up to the end of the shipping period. The authority for that (if any be wanted) is to be found in *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co. Ltd.*[20] So it is said that there is a distinction to be drawn between a c.i.f. contract and a classic f.o.b. contract, and a distinction to be drawn between a classic f.o.b. contract and those f.o.b. contracts which were the subjects of the cases to which Mr. Kerr referred, namely, that in the classic f.o.b. contract, where the buyer can dictate the date of shipment, the seller is not obliged to commence any of the operations directed to performing his obligations under the contract until he has had shipping instructions or calling forward instructions from the buyer. It is urged by Mr. Lawson that, applying the ratio decidendi in the c.i.f. contract cases—the *Pavia* [21] line of cases—the time at which the confirmed credit must be opened is a reasonable time before the shipping instructions take effect. The rival contention by Mr. Kerr is that the credit must be opened a reasonable time (as he put it) before the earliest shipping date; but in his reply he was prepared to put it as at latest by the earliest shipping date. Mr. Lawson, on the other hand, says that it must be a reasonable time before the actual shipping date.

There is no authority which guides me in this matter. It seems to me, however, that the contention for which Mr. Kerr argues is the sensible one, and, since it is the sensible one, and since there is no authority to the contrary, the one which I am inclined to hold, and do hold, is good law.

I am fortified in this view by the fact that it is quite apparent from the correspondence and from the conduct of the parties in this case (and, so far as one can see, from that of the parties to the other contracts) that it is their view that that was the requirement of the contract. It seems to me that, particularly in a trade of this kind, where, as is known to all parties participating, there may well be a string of contracts all of which are financed by, and can only be financed by, the credit opened by the ultimate user which goes down the string getting less and less until it comes to the ultimate supplier, the business sense of the arrangement requires that by the time the shipping period starts each of the sellers should receive the assurance from the banker that if he performs his part of the contract he will receive payment. That seems to me at least to have the advantage of providing a definite date by which the parties know they have to fulfil the obligation of opening a credit.

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[17] [1952] 2 Q.B. 297.

[18] [1957] 1 Lloyd's Rep. 517.

[19] [1955] 1 Lloyd's Rep. 303.

[20] (1922) 28 Com.Cas. 42.

[21] [1952] 2 Q.B. 84.

The alternative view put forward by Mr. Lawson, namely, that the credit has to be opened a reasonable time before the actual shipping date, seems to me to lead to an uncertainty on the part of buyer and seller which I should be reluctant to import into any commercial contract. I asked Mr. Lawson, when the court came to consider what was a reasonable time, which must depend upon the circumstances, whether it depended upon the circumstances known to the parties at the time of the contract, or the circumstances as ascertained later before the shipping instructions were given—or, as a third alternative, the circumstances as they actually were, whether known to the parties or not. It seems to me that that sort of uncertainty is open to the same criticism which Somervell L.J. directed to the argument put forward to him in *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen.*[22] What was argued in that case was that the buyer need not open the credit until the seller was ready to deliver and had got bills of lading; and Somervell L.J. said then[23]: "My view is that "the contract would be unworkable if, as suggested by Mr. "Widgery, the buyer under it was under no obligation until a "date, which he could not possibly know, and which there is no "machinery for his finding out, namely, when the seller actually "has the goods down at the port ready to be put onto the ship."

It seems to me that on Mr. Lawson's argument the obligation that arises on the buyer does not arise until a date which he could not possibly know, because it is a date which must depend on circumstances which would not normally be known to him: he does not know, and would not normally know, how long a chain there was between him and the actual manufacturer or stockist to whom the credit or some subsequent back-to-back credit founded upon it has to be transferred: he would not know how long it would take to bring the goods from the place where they were and transport them to the port: he would not know in a case of this kind, and did not know, whether or not the goods had to be rolled to order or whether they were in stock or whether they were partly rolled. It seems to me that in a case of this kind, and in the case of an ordinary f.o.b. contract financed by a confirmed banker's credit, the prima facie rule is that the credit must be opened at latest (and that is as far as I need go for the purposes of this case) by the earliest shipping date. In that way one gets certainty into what is a very common commercial contract. In any other way one can, I think, only get a position in which neither buyer nor seller knows what his rights are until all the facts have been ascertained, and one, and possibly two or three, courts have directed their minds to the question whether in all the circumstances that was a reasonable time for the credit to be opened.

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[22] [1952] 2 Q.B. 84.

[23] Ibid. 88.

I therefore hold that it was the duty of the defendants under this contract to open their letter of credit or to get a banker's pre-advice of it by August 1, 1956, at the latest. That makes it necessary for me to consider the second line of defence, namely, that the plaintiffs waived their right to treat the contract as repudiated by the defendants when they failed to open their letter of credit within the appropriate time. The defendants rely for that waiver first on the letter of August 8, 1956, which calls upon the defendants to open the letter of credit immediately. I think there is no doubt that that letter did amount to a waiver of their right to treat the contract as repudiated by breach of condition until such time had elapsed after receipt of that letter by the defendants as could reasonably be called "immediately." Certainly that time had elapsed by August 14 on which date a letter was sent which said: "In "view of your failure to adhere to the conditions of the above-"mentioned contract we must hold you responsible for all "consequences arising out of this and have no option but to "place the matter into the hands of our legal advisers." It is, in my view, perfectly plain that at that date the plaintiffs accepted the breach of condition by the defendants in failing to open a credit as a repudiation of the contract. It was obviously a term which went to the root of the contract, and they were entitled so to do in law.

[His Lordship having referred to the correspondence then said that he could find no sign in the subsequent correspondence or in the actions of the parties of any waiver by the plaintiffs of their rights, and that he would be reluctant to find that by taking the course which they had at the request of the defendants, the plaintiffs were to discover that they had waived their rights without any intention to do so. His Lordship continued:]

There remains one final matter, namely, the question of damages. In accordance with the judgment in *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*,[24] in a case of this kind, where there is a string of contracts which it is known (as it was in this case) can only be financed by a letter of credit from the ultimate buyer, prima facie the measure of damages is the loss of profit on the transaction, since the defendants must have known that their failure to provide the letter of credit would make it impossible for the plaintiffs to carry out the transaction, just as failure on their own buyer's part to provide a letter of credit made it impossible for the defendants themselves to carry out the transaction. I think, therefore, that probably the right basis is loss of profit. The matter was pleaded in that way in the alternative by amendment, which I allowed at a late stage upon terms that it did not increase the amount of damages recoverable. Mr. Kerr has sought damages on the difference between the contract price, namely, 205 dollars per metric ton, and the market price at the time. He says that the market price at the time was 194 dollars, being the price at which the Swiss company were prepared to buy from his clients on August 14, 1956. Mr. Lawson has sought to argue that some higher price represented the market price. I observe that when the defendants themselves were trying to sell these goods the asking price was 195 dollars per ton. The asking price in this business, as in other businesses, does not represent a price less than the market price, and I find that the market price here at the relevant time is fairly represented by the figure of 194 dollars, which the plaintiffs received. They are, therefore, in my view, entitled to damages in the sum claimed.

[For the purposes of an appeal, his Lordship found that a reasonable time before the last possible shipping date for opening the letter of credit would have expired three weeks before September 30, 1956, the last day of the shipment period.]

Judgment for plaintiffs for £1,886 15s. 8d.

Solicitors: *Matthew Trackman, Lifton & Cunnington; Rising & Ravenscroft.*

E. M. W.

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[24] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970; reversing in part [1951] 2 Lloyd's Rep. 644.

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Mar. 3, 4, 5,
6, 10.

Diplock J.

PORT LINE LTD. *v.* BEN LINE STEAMERS LTD.

[1957 P. No. 85.]

Restrictive Covenant—Chattel—Ship—Charterparty—Time charter in gross—Purchase of vessel—Whether purchaser with notice affected by charter.

Shipping — Charterparty — Sale of vessel under charter — Purchaser's notice of charter—Whether affected by it.

Shipping — Requisition — Compensation — X's bareboat charter from owners determined by requisition—Charterers' time charter with X not so determined—Whether charterers can recover compensation paid to owners for requisition period—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 4 (3).

Contract—Frustration—Charterparty—Time charter—Requisition for three months—Ten months to run after requisition.

Judicial Precedent—Privy Council decision—How far binding—Difficulty in ascertaining ratio decidendi—Irreconcilability with well-established principles of law—Insoluble problems raised by decision.

The plaintiffs chartered a vessel on a gross time charter from Silver Line Ltd. for a period of about 30 months from March 9, 1955. In February, 1956, Silver Line sold the vessel to the defendants but they chartered by demise the vessel back to Silver Line for the unexpired period of the plaintiffs' time charter. That charterparty contained a clause providing: "If the ship be requisi- "tioned this charter shall thereupon cease." The defendants were unaware that the time charter between Silver Line and the plaintiffs contained no similar clause. At the end of August, 1956, the Ministry of Transport requisitioned the vessel and subsequently agreed with the defendants the rate of hire during the period of requisition which continued until November 28, 1956. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line, despite the latter's contention that the plaintiffs' time charter with them was frustrated. The plaintiffs claimed to recover from the defendants the whole or part of the compensation received by the defendants from the Crown in respect of the requisition period on the grounds, inter alia, that as there was a subsisting contract between the plaintiffs and Silver Line, the plaintiffs were entitled as against the defendants on the principle laid down in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.* [1926] A.C. 108; 42 T.L.R. 86, to have the vessel used for the carriage of their goods; and that in any event they were entitled to recover from the defendants under the Compensation (Defence) Act, 1939, if it applied, the bareboat element of the compensation under section 4 (3), which provides: "Where, on the day on which any "compensation accrues due by virtue of paragraph (*a*) of sub- "subsection (1) of this section,"—that was the bareboat element— "a person other than the owner of the vessel . . . is, by virtue of a "subsisting charter . . . the person who would be entitled to posses- "sion of, or to use, the vessel, . . . but for the requisition, the "person to whom the compensation is paid shall be deemed to "receive it as trustee for the first mentioned person":—

Held, (1) that the requisition of the vessel which, at the time of the requisition was thought likely to, and in fact did, last about three months, did not frustrate the time charterparty between the plaintiffs and Silver Line, which at the time of derequisition still had 10 months to run, and, accordingly, there was at all material times a valid and subsisting contract between the plaintiffs and Silver Line.

(2) But that the claim failed because (i) the *Strathcona* case was wrongly decided; (ii) even if it was rightly decided, the defendants did not come within its principles as they had no actual knowledge at the time of their purchase of the plaintiffs' rights under their charter; (iii) even if the defendants came within its principles (a) they were in breach of no duty to the plaintiffs since it was by no act of theirs that the vessel during the period of requisition was used inconsistently with the terms of the plaintiffs' charter—it was by act of the Crown by title paramount—and (b) the plaintiffs were not entitled to any remedy against the defendants except a right to restrain the defendants from using the vessel in a manner inconsistent with the terms of the charter.

Lord Strathcona Steamship Co. Ltd. v. *Dominion Coal Co. Ltd.* (supra) not followed.

De Mattos v. *Gibson* (1858) 4 De G. & J. 276 explained.

(3) That, although the Compensation (Defence) Act, 1939, covered the requisition and compensation was payable under it, nevertheless section 4 (3) did not constitute the defendants statutory trustees of the compensation, because although the plaintiffs, at the time when the compensation accrued due, had a subsisting contract with Silver Line, Silver Line did not have possession of the vessel and were not entitled to possession, since the requisition had determined Silver Line's charter from the defendants, and, accordingly, the plaintiffs were not entitled to any part of the compensation paid to the defendants in respect of the requisitioning period.

ACTION.

The plaintiffs, Port Line Ltd., chartered a vessel from the then owners, Silver Line Ltd., on a gross time charter for a period of about 30 months, and they took delivery on March 9, 1955. In February, 1956, Silver Line sold the vessel to the defendants, Ben Line Steamers Ltd., and provision was made to cover the unexpired term of the plaintiffs' time charter with Silver Line by the defendants chartering the vessel by demise to Silver Line for the unexpired term of the plaintiffs' charter. The bareboat charter between Silver Line and the defendants contained a clause providing: "If the ship be requisitioned this "charter shall thereupon cease." There was no comparable provision in the plaintiffs' gross time charter. On August 22, 1956, due to the Suez crisis, the Ministry of Transport informed the defendants that the vessel was requisitioned and it was put at the Crown's disposition on August 29. On September 10, the defendants entered into an agreement with the Ministry providing for the rates of hire during the period of requisition. Requisition continued until November 28, 1956, when the vessel was released to the defendants. It was agreed by the parties that when notice of requisition was given on August 22, a reasonable estimate of the duration of the requisition was from three to four months. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line despite the latter's contention that the plaintiffs' time charter with them was frustrated.

The plaintiffs claimed to recover the whole or part of the compensation received by the defendants from the Crown in respect of the requisition period on the grounds, inter alia, that as there was a subsisting contract between the plaintiffs and Silver Line at the material time, the plaintiffs were entitled as against the defendants on the principle laid down in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*[1] to have the vessel used for the carriage of their goods; that they were entitled to recover from the defendants under the Compensation (Defence) Act, 1939, if it applied, the bareboat element of the compensation under section 4 (3) [2]; alternatively, if the Act did not apply, they were entitled to a portion of the compensation in accordance with the principles laid down in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[3]

The defendants alleged that the plaintiffs' contract with Silver Line was frustrated by the requisitioning; that the *Strathcona* case [4] was wrongly decided; that, even if rightly decided, it only applied where the subsequent purchaser had express notice of the terms of a subsisting charterparty, and that, in any event, it laid down no principle which entitled the plaintiffs to have the vessel used for the carriage of their goods, and imposed no obligation on the defendants to account as constructive trustees; that the Compensation (Defence) Act, 1939, applied, but gave no rights to the plaintiffs; and that the *Tamplin* case[5] apportionment was excluded by the Act of 1939, and in any event did not apply.

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[1] [1926] A.C. 108; 42 T.L.R. 86.

[2] Compensation (Defence) Act, 1939, s. 4 (3): "Where, on the day "on which any compensation accrues "due by virtue of paragraph (*a*) of "subsection (1) of this section, a "person other than the owner of "the vessel . . . is, by virtue of a "subsisting charter or contract of "hiring, the person who would be "entitled to possession of, or to use, "the vessel . . . but for the requisi"tion, the person to whom the com"pensation is paid shall be deemed "to receive it as a trustee for the "first mentioned person."

[3] [1916] 2 A.C. 397; 32 T.L.R. 677.

[4] [1926] A.C. 108.

The facts are more fully set out in the judgment.

Eustace Roskill Q.C. and *B. J. Brooke-Smith* for the plaintiffs. The plaintiffs' claim is based on three grounds: first, a claim as of right; secondly, a claim for money had and received; and, thirdly, a claim based on equitable principles. Five points arise. First, was the Port Line/Silver Line charterparty frustrated by the requisition? It is submitted that it was not. If the charterparty was frustrated, then the plaintiffs fail. Secondly, if the charterparty was not frustrated, it was a subsisting contract within the meaning of section 4 (3) of the Compensation (Defence) Act, 1939, and the defendants received the hire compensation as trustees for the plaintiffs. Thirdly, if that is right prima facie, can the defendants escape from the Act? They seek to do so for two reasons: they say that (i) they made an agreement with the Crown and everything they received accrued under that agreement and section 4 (3) does not apply; (ii) the requisition terminated when they made the agreement and the Act does not apply to payments made after the end of the requisition. Apart from authority, requisition continues irrespective of payments under agreements. If the plaintiffs are right so far, they succeed under the Act. Fourthly, the plaintiffs are persons interested within the aspect elaborated by Lord Parker in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[6] Fifthly, the defendants bought with notice of the plaintiffs' interest and became trustees with obligations which a court of equity will enforce: *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*[7]

With regard to the question of frustration, the following conclusions can be drawn from the facts: (1) on the date of requisition (whether it was August 22 or August 29, 1956), there was over one year left of the Port Line/Silver Line charterparty; (2) the requisition lasted just over three months; (3) at the date of release there were over nine months left of the charterparty period; and (4) at the date of the requisition (which for this purpose was taken to be August 22) a reasonable estimate of the period of requisition was three to four months.

It cannot be said that a requisition of three to four months would destroy the contract which had nearly a year to run after

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[5] [1916] 2 A.C. 397.

[6] Ibid.

[7] [1926] A.C. 108.

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the end of the requisition. This charterparty was not frustrated; the proper test is that laid down by Bailhache J. in *Admiral Shipping Co. Ltd.* v. *Weidner, Hopkins & Co.*[8] [Reference was made to *Tamplin's* case[9]; *Davis Contractors Ltd.* v. *Fareham Urban District Council*[10]; *Countess of Warwick Steamship Co.* v. *Le Nickel S.A.*[11] and *Bank Line Ltd.* v. *Arthur Capel & Co.*[12] and Scrutton on Charterparties, 16th ed., pp. 115–117.]

Assuming that the Compensation (Defence) Act, 1939, applies (notwithstanding any alleged agreement with the Crown (*The Broadmayne*[13])), then the plaintiffs succeed under section 4 (3) as a matter of construction either because of their subsisting contract with Silver Line or, alternatively, because of the *Strathcona* case.[14] The Compensation (Defence) Act, 1939, applies as being such an enactment as is referred to in paragraph 4 of the Requisitioning of Ships Order, 1956. Alternatively, if the Act does not apply, the plaintiffs are for the purposes of the Order within Lord Parker's definition of "owner" in *Tamplin.*[15] If the Act is still in force and the plaintiffs come within the section, then it would seem that they cannot rely on *Tamplin,*[15] which appears to be based on the absence of a statute. If the Act applies, but the plaintiffs do not come within section 4 (3), then they come within Lord Parker's speech in *Tamplin*[15] and also within the following cases: *Chinese Mining and Engineering Co. Ltd.* v. *Sale & Co.*[16]; *Elliott Steam Tug Co. Ltd.* v. *Charles Duncan & Sons Ltd.*[17]; *Dominion Coal Co. Ltd.* v. *Maskinonge Steamship Co. Ltd.*[18] and *Dominion Coal Co. Ltd.* v. *Lord Curzon Steamship Co. Ltd.*[19]

The following propositions are based on *Strathcona*[20]: first, where a purchaser of a ship purchases with notice (even constructive notice) that a third person has a contractual interest in that ship which requires the ship to be used for a particular purpose and not inconsistently with that purpose, equity will not allow the purchaser to violate that interest and will restrain him from doing so; secondly, in such a case the purchaser is a constructive trustee of the right to use the ship and equity will restrain him from violating that trust; thirdly, in each of those two cases, if the purchaser has the benefit of the user of the ship inconsistent with the charterers' right, or by any other breach of trust, the purchaser will be accountable to the charterers for that benefit. Those propositions have been framed in relation to ships but they can be enlarged to include things real and personal, except that in relation to real property a dominant interest must be retained. [Reference was made to *Warner Brothers Pictures Incorporated* v. *Nelson*[21]; *Greenhalgh* v. *Mallard*[22]; *Lorentzen* v. *White Shipping Co. Ltd.*[23]; *Bendall* v. *McWhirter*[24]; *Tulk* v. *Moxhay*[25]; *De Mattos* v. *Gibson*[26]; *Falcke* v. *Gray*[27]; *Messageries Imperiales Co.* v. *Baines*[28]; *Catt* v. *Tourle*[29]; *Werderman* v. *Société Générale d'Electricité*[30]; *Taddy & Co.* v. *Sterious & Co.*[31]; *McGruther* v. *Pitcher*[32]; *Erskine Macdonald Ltd.* v. *Eyles*[33]; *The Lord Strathcona*[34]; Ashburner's Principles of Equity, 1st ed., pp. 507 et seq.; Kerr on Injunctions, 6th ed., p. 463, and Carver's Carriage of Goods by Sea, 2nd ed., pp. 40, 41.]

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[8] [1916] 1 K.B. 429; [1917] 1 K.B. 222; 33 T.L.R. 71.

[9] [1916] 2 A.C. 397.

[10] [1956] A.C. 696; [1956] 2 All E.R. 145.

[11] [1918] 1 K.B. 372.

[12] [1919] A.C. 435; 35 T.L.R. 150.

[13] [1916] P. 64; 32 T.L.R. 304.

[14] [1926] A.C. 108.

[15] [1916] 2 A.C. 397.

[16] [1917] 2 K.B. 599; 33 T.L.R. 464.

[17] (1918) 34 T.L.R. 583.

[18] [1922] 2 K.B. 132; 38 T.L.R. 591.

[19] (1922) 12 Ll.L.Rep. 490.

[20] [1926] A.C. 108.

[Diplock J. The constructive trustee has raised his head in *Strathcona*[34]—what is the trust estate?]

The trust estate is the chose in action which the charterers possess, namely, the right to use the ship. The trust is either express or constructive. If the defendants acknowledge the third party's interest, then the trust is express; if not, the mere fact that they took with notice is sufficient to import the obligations of constructive trustees. With regard to notice, it is sufficient that the defendants had express notice of the existence of a charter between Port Line and Silver Line, because it does show that there was an incumbrance on the ship, and, secondly, as it cannot be said that the defendants had actual notice, constructive notice of the terms of the charter is sufficient.

[Diplock J. The most that you can say is that the defendants were negligent in not examining for themselves the terms of your charterparty, which means that they were under some duty to you to examine them.]

It was not put like that. The defendants did not owe the plaintiffs any duty. The duty was owed to Silver Line or to themselves.

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[21] [1937] 1 K.B. 209; 53 T.L.R. 14; [1936] 3 All E.R. 160.

[22] [1943] 2 All E.R. 234.

[23] (1942) 74 Ll.L.Rep. 161.

[24] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[25] (1848) 2 Ph. 774.

[26] (1858) 4 De G. & J. 276.

[27] (1859) 4 Drew. 651.

[28] (1863) 7 L.T. 763.

[29] (1869) L.R. 4 Ch. 654.

[30] (1881) 19 Ch.D. 246.

[31] [1904] 1 Ch. 354; 20 T.L.R. 102.

[32] [1904] 2 Ch. 306; 20 T.L.R. 652.

[33] [1921] 1 Ch. 631; 37 T.L.R. 187.

[34] [1926] A.C. 108.

The plaintiffs are entitled to relief and its extent depends on whether the court takes the view that they are entitled to the whole of the compensation, the bareboat element, or to an apportioned sum calculated in accordance with the principles laid down in *Tamplin*[35] and the *Chinese Mining* case.[36]

A. A. Mocatta Q.C., *Michael Kerr* and *Peter Oliver* for the defendants. The case falls under the following heads: (1) Frustration, which is a necessary condition precedent to the plaintiffs' claim; (2) the Compensation (Defence) Act, 1939; (3) the effect of the Requisition of Ships Order, 1956, or *Tamplin*,[37] or both; and (4) *Strathcona*.[38]

With regard, first, to frustration, because that is a condition precedent to the plaintiffs' claim, the relevant facts are: (1) the vessel was requisitioned on August 28–29; (2) the charter had 12½ months to run; (3) an estimate of the time which the requisition would run was about three to four months. On those facts, one has to compare a charterparty of 12½ months from the end of August, 1956, with one for eight to nine months from the end of December, 1956. So far as the tests are concerned, that of Bailhache J. in *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.*[39] is quite irrelevant to the present case. Here there cannot be any "postponement" of contractual services. The period taken up by the requisition is irretrievably subtracted from the period of the charterparty. Bailhache J.'s test is not appropriate for this type of case; and the recent cases make it clear that one has to see whether what remains after requisition is different in kind from what had been agreed originally. [Reference was made to *Tamplin's* case[40]; *Bank Line Ltd.* v. *Arthur Capel & Co.*[41]; *Davis Contractors Ltd.* v. *Fareham Urban District Council*[42]; and Scrutton on Charterparties, 16th ed., p. 113, footnote (*b*).]

The second major point is based on section 4 (3) of the Compensation (Defence) Act, 1939, and, alternatively, or in addition, on section 14. That claim fails, either because section 4 (3) does not apply except where there is a subsisting charter or contract of hiring with the owner; or, alternatively, section 4 (3) does not apply where the compensation payable has been the subject-matter of an agreement, as it was in the present case: see section 15. It is not submitted that the agreement took the ship out of requisition.

[35] [1916] 2 A.C. 397.

[36] [1917] 2 K.B. 599.

[37] [1916] 2 A.C. 397.

[38] [1926] A.C. 108.

[39] [1916] 1 K.B. 429.

[40] [1916] 2 A.C. 397.

[41] [1919] A.C. 435.

[42] [1956] A.C. 696.

[DIPLOCK J. You need not deal with section 4 (3) simpliciter, because I don't think that the plaintiffs can recover under that section without the aid of *Strathcona*.[43]]

Strathcona[43] does not help the plaintiffs to recover under section 4 (3). Even if *Strathcona*[43] is right, it does not produce a contract with an owner, and even if applicable it does not begin to come within the language of section 4 (3). *Strathcona*[43] cannot have the effect of altering the construction of the Act so as to provide that the owner is a party to the hiring. It must be the owner because he is the person to whom the compensation will be paid. *Strathcona*,[43] so far as it goes, only gives a negative right to prevent someone from doing something with a ship; it does not confer any positive rights in a ship upon a claimant. Even if *Strathcona*[43] is right, it would not enable the plaintiffs to come under section 4 (3). If *Strathcona*[43] can only be justified by the alleged special position of a ship in law, and the plaintiffs were right, one would get a very strange anomaly, for if *Strathcona*[43] brings them within section 4 (3), what would happen where the requisitioned chattel was not a ship, e.g., a motor-vehicle, where *Strathcona*[43] would not apply?

The plaintiffs admit that if the Act of 1939 applies to the requisition, then if they cannot bring themselves within section 4 (3), *Tamplin*[44] would not apply; but if the Act does not apply at all (because of the wording of the Requisition of Ships Order, 1956), then they rely on *Tamplin*.[44] The defendants concede that the Act of 1939 applies, notwithstanding the wording of article 4 of the Order of 1956, but contend that the plaintiffs cannot bring themselves within section 4 (3); therefore it is common ground that *Tamplin*[44] does not apply and need not be considered.

It is submitted that the *Strathcona* case[45] was wrongly decided, and it is admittedly not binding on the court. Secondly, even if it were rightly decided, it has no application to the present case because the doctrine applies negatively by way of injunction to restrain an act by a third party, not positively by specific performance or damages requiring the payment of money. There is the additional fact that the defendants did not do anything during the period of requisition of which complaint could have been made, and no injunction was sought or could have been sought against them. The defendants did not prevent the plaintiffs from taking the vessel; it was taken from them by the

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[43] [1926] A.C. 108.

[44] [1916] 2 A.C. 397.

[45] [1926] A.C. 108.

Crown, and the Crown would have taken the vessel whether the defendants had made a contract with Silver Line or not. Thirdly, if that is so, the plaintiffs' case fails, subject only to the constructive trustee point, always provided that that can stand alone. *Strathcona*[45] does not decide that a party is liable to account as constructive trustee, and any such argument would be wrong in law, whether or not the rest of the case is rightly decided. Fourthly, the doctrine enunciated in *Strathcona*[45] depends on notice. The defendants had no notice that they were infringing any of the plaintiffs' rights, and it is not suggested that they did have such notice. To the extent that notice is a vital ground, that is lacking. Fifthly, to the extent which the plaintiffs seek to say that the defendants ought to have had notice, there is no room for the doctrine of constructive notice in commercial transactions: *Manchester Trust* v. *Furness*.[46]

It has been decided in a number of cases that a time charterparty gives a charterer no proprietary interest in the ship: (1) in the case of real property (a) an equitable interest is created by a restrictive covenant providing that the covenantee retains an interest in the land which can benefit from the covenant; (b) such covenantee can enforce the covenant against the purchaser for value of the legal estate in the property unless the latter has no actual or constructive notice of the same; (2) in the case of chattels or personal property, save for certain exceptional cases of patents or copyright, any restriction as to price or use arising out of an agreement to which he was not a party does not bind a purchaser of the property, even with notice.

If *Strathcona*[47] is based on *Tulk* v. *Moxhay*,[48] it is wrong, because the doctrine of that case has been restricted to particular types of negative covenants in relation to land. *Tulk* v. *Moxhay*[48] does not itself show that notice is all that is required and that a dominant tenement is irrelevant. If *Strathcona*[49] is based on *De Mattos* v. *Gibson*,[50] that has been disapproved since. At what stage could the plaintiffs in the present case have got an injunction? Only if, after derequisition, the defendants had insisted on doing what they wanted with the vessel; that might have given the plaintiffs some ground, but on the facts the present case is quite different from *De Mattos*.[50] [Reference was made to *Falcke* v. *Gray*[51]; *Messageries Imperiales Co.* v. *Baines*[52]; *Catt*

[45] [1926] A.C. 108.
[46] [1895] 2 Q.B. 539.
[47] [1926] A.C. 108.
[48] 2 Ph. 774.
[49] [1926] A.C. 108.
[50] 4 De G. & J. 276.
[51] 4 Drew 651.
[52] 7 L.T. 763.

v. *Tourle* [53]; *Taddy & Co.* v. *Sterious & Co.*[54]; *McGruther* v. *Pitcher* [55]; *Badische Anilin und Soda Fabrik* v. *Isler* [56]; *National Phonograph Co. of Australia Ltd.* v. *Menck* [57]; *London County Council* v. *Allen* [58]; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[59]; *Barker* v. *Stickney* [60]; *Erskine Macdonald Ltd.* v. *Eyles* [61]; *Clore* v. *Theatrical Properties Ltd.*[62]; *Greenhalgh* v. *Mallard* [63]; *Bendall* v. *McWhirter* [64]; *Lorentzen* v. *White Shipping Co. Ltd.*[65]; *Cox* v. *Bishop* [66]; *Smith* v. *Colbourne* [67]; Cheshire and Fifoot's Law of Contract, 4th ed., pp. 377, 378; and Ashburner's Principles of Equity, 1st ed., p. 513.]

On the point of constructive trustee, the plaintiffs would have to show that not only could the defendants have been restrained by injunction after derequisition but that they received the money as constructive trustees. It is to be remembered that there are only three types of trusts: express, resulting and constructive trusts. There is here no express trust, no resulting trust and no circumstances to justify a constructive trust. "Property "capable of being subjected to a trust" is "Any property or "interest in property which a person can at law or in equity "transfer or assign, or dispose of inter vivos, or by testamentary "instrument, can be affected by him with a trust by an instru- "ment inter vivos or by a testamentary instrument": Halsbury's Laws of England, 2nd ed., vol. 33, p. 110. The reference to constructive trustee in *Strathcona* [68] is a loose use of the expression not intended to be taken literally. In the same passage in which the words "constructive trustee" appear the Board are talking of negative obligations, and a trust with an obligation is an impossibility. [Reference was made to *Pooley* v. *Budd*,[69] *Hudston* v. *Viney* [70] and *Parker* v. *Judkin*.[71]]

The crux of the matter is that the plaintiffs had some claim against Silver Line but none against these defendants.

Roskill Q.C. in reply.

[DIPLOCK J. You need not deal with the question of frustration.]

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[53] L.R. 4 Ch. 654.
[54] [1904] 1 Ch. 354.
[55] [1904] 2 Ch. 306.
[56] [1906] 1 Ch. 605; 22 T.L.R. 326.
[57] [1911] A.C. 336; 27 T.L.R. 239.
[58] [1914] 3 K.B. 642.
[59] [1915] A.C. 847; 31 T.L.R. 399.
[60] [1919] 1 K.B. 121.
[61] [1921] 1 Ch. 631.
[62] [1936] 3 All E.R. 483.
[63] [1943] 2 All E.R. 234.
[64] [1952] 2 Q.B. 466.
[65] 74 Ll.L.Rep. 161.
[66] (1857) 8 De G.M. & G. 815.
[67] [1914] 2 Ch. 533.
[68] [1926] A.C. 108.
[69] (1851) 14 Beav. 34.
[70] [1921] 1 Ch. 98.
[71] [1931] 1 Ch. 475.

On section 4 (3) of the Compensation (Defence) Act, 1939, the defendants' construction requires additional words to be put into the subsection, whereas the plaintiffs' literal reading of the subsection does not require anything to be added. The defendants' argument on *Strathcona* [72] confuses the right of the beneficiary of the trust with the remedy. Equity gave no adequate remedy because it would not grant specific performance, but it would grant an injunction. The plaintiffs have a right or entitlement by virtue of a subsisting contract which they could have enforced against a purchaser with notice. [Reference was made to Sir William Holdsworth's review of the second edition of Ashburner's Principles of Equity, in which he gave his views on the decision in *Strathcona* [72]: (1933) 49 L.Q.R. 576, 579.] The plaintiffs' dominant tenement is their right to use the ship; the servient tenement is the ship. If the plaintiffs establish the requisite interest the court cannot decide against the plaintiffs unless the court is prepared to say that the second leg of *Strathcona*,[72] the constructive trustee point, is wrong. Accordingly, *Strathcona* [72] applies either to reinforce the plaintiffs' argument under section 4 (3) or as an independent point. If a shipowner buys a ship which is itself subject to an equity, his right is already restricted; he, therefore, is a trustee not only of all the rights to which the equity attached, but he is also under a duty to perform the obligations which attached to that right. It is accepted that the defendants did not know of the absence of the termination clause in the Port Line/Silver Line charterparty, but the defendants purchased and signed in terms which showed notice of matters affecting the vendor's title. [Reference was made to *Jones* v. *Smith* [73] and Snell's Principles of Equity, 24th ed., p. 46.]

Cur. adv. vult.

March 10. DIPLOCK J. read the following judgment: In this case the plaintiffs claim to recover from the defendants the whole or part of the compensation received by the defendants from the Crown in respect of the requisition by the Crown at the time of the Suez crisis of a vessel now known as the *Benvannoch*.

This vessel, then known as the *Silveroak*, was chartered to the plaintiffs by its then owners, Silver Line Ltd., on a gross time charter dated November 5, 1954, for a period of about 30 months from February/March, 1955, at 26s. per deadweight ton per month. The charter was in the form approved by the New York

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[72] [1926] A.C. 108.

[73] (1841) 1 Hare 43.

Produce Exchange, and it is only necessary to note that by clause 1 the owners were to provide and pay for provisions, master and crew, and by clause 26 that nothing contained in the time charter was to be construed as a demise of the vessel to the plaintiffs. There was no provision for substituting another vessel and the off-hire clause (clause 15) does not include time lost by requisition. Delivery of the vessel took place on March 9, 1955, and redelivery was accordingly not due until about September 9, 1957.

In January, 1956, negotiations took place between Silver Line and the defendants for the sale of the vessel, by then named *Port Stephens*, to the defendants. As at that date the plaintiffs' time charter had still some 21 months to run, the original intention of Silver Line and the defendants was that the defendants should demise the vessel back to Silver Line for the period of the remainder of the plaintiffs' existing gross time charter from Silver Line, and that the approval of the plaintiffs to the arrangements for carrying out the balance of their time charter should be obtained by Silver Line.

The method of carrying this out, although there is no suggestion of bad faith on anyone's part, was in the result unfortunate. On January 30, 1956, Silver Line sent to the defendants a draft of the agreement for sale of the vessel. This draft and the final agreement for sale as executed contained the two following clauses: "11. The vendors having committed the vessel on time-"charter to Port Line Ltd. of London for a period of 2½ years "commencing March 9, 1955, and estimated to terminate about "September, 1957, it is hereby agreed that purchasers shall "charter the vessel to the vendors for the remaining period of "the aforesaid time-charter upon the terms and conditions of the "charterparty attached thereto such charter to commence imme-"diately on transfer of the vessel to purchasers under this "agreement . . . 13. This agreement is subject to vendors "obtaining the approval of Port Line Ltd. to the transfer of "ownership of the vessel to the purchasers and the arrangements "herein provided for the carrying out of this balance of the time-"charter to Port Line Ltd."

The draft of the bareboat charter referred to in clause 11 was being prepared by the defendants, and had not yet been submitted to Silver Line, but on February 2, 1956, Silver Line wrote to the plaintiffs a letter in the following terms: "Dear Sirs, *M.V. Port* "*Stephens*. We wish to advise you that we have agreed, subject "to your approval, to sell the above vessel to Ben Line Steamers

" Ltd. A condition of the sale is that the vessel will immediately " be chartered by demise to us for the balance of her time charter " with you. Under this arrangement the management of the " vessel will, of course, remain entirely in our hands, and we " would greatly appreciate your formal confirmation that you are " agreeable to this arrangement. Yours faithfully, Silver Line " Ltd."

To this the plaintiffs replied on February 8 as follows: " Dear " Sirs, *M.V. Port Stephens.* We have your letter of February 2 " and are very interested to learn that you have agreed to sell " this vessel to Ben Line Steamers Ltd. We note that you have " arranged that she will be chartered on demise from Ben Line " for the balance of our time charter and we appreciate that as " far as we are concerned we shall still be dealing with your" selves, as disponent owners, since the management of *Port* " *Stephens* will remain entirely in your hands. We would con" firm that we have no objection to the sale of this vessel. Yours " faithfully, Port Line Ltd." In the meantime, on February 6, two days before the date of the plaintiffs' letter to Silver Line, the defendants, who had not either at this or any stage seen the terms of the plaintiffs' time charter, sent to the Silver Line Ltd. a proposed draft of the bareboat charter drawn up on the basis of a Ministry of Transport document. This draft contained a clause giving to the defendants a right by notice in writing to terminate the bareboat charter if the defendants " shall at any " time require the ship for any purpose for which British ships " registered in the United Kingdom may at that time be " requisitioned." Correspondence followed between Silver Line Ltd. and the defendants and, in particular, on February 9, 1956, the Silver Line proposed a number of minor alterations, some of which were stated to be to bring the bareboat charter in line with the plaintiffs' gross time charter. Among the alterations suggested by Silver Line (although not expressed to be to bring the bareboat charter in line with the plaintiffs' charter) was an amendment to the requisition clause to make it read as follows: " If the ship be requisitioned this charter shall thereupon expire." This amendment was accepted by the defendants on February 10, and on February 13 Silver Line Ltd. in a letter which suggested some further amendments to the bareboat charter to bring it into line with the plaintiffs' time charter, forwarded to the defendants the plaintiffs' letter of February 8 consenting to the transfer of ownership. The agreement of sale and the bareboat charter were finally signed on February 15, although backdated to February 8.

It is to be observed that the requisitioning clause in the bareboat charter as a result of the amendment proposed by Silver Line Ltd. had the effect of automatically terminating the bareboat charter in the event of requisition of the vessel, although the plaintiffs' gross time charter contained no provision for termination in that event. It is not, however, suggested that the defendants were aware of this difference in the possible duration of the bareboat charter and the plaintiffs' time charter. They never saw or asked to see the plaintiffs' time charter and it is, I think, plain from the correspondence that they relied on Silver Line to see that the bareboat charter was in terms which would enable Silver Line to fulfil its obligations to the plaintiffs under the plaintiffs' time charter.

Mr. Roskill has suggested that a careful examination of the plaintiffs' letter of February 8 would have shown the defendants that, although it bore a date two days after the draft bareboat charter had been submitted to Silver Line, the reference in that letter to Silver Line's letter of February 2 should have aroused the defendants' suspicions that the plaintiffs had not in fact seen the proposed terms of the bareboat charter. I should be sorry to hold that commercial men had to read commercial correspondence so meticulously either in the modern sense of that adverb, or in the sense preferred by Fowler.

No doubt in February, 1956, it was not expected by any of the parties that the question of requisitioning would arise during the remaining period of the plaintiffs' gross time charter; but, unfortunately, in August the Suez crisis arose, and by a telegram dated August 22 addressed to the defendants the Ministry of Transport requisitioned the vessel and required her to be put at the Crown's disposal on completion of discharge. She was, in fact, put at the Crown's disposal at noon on August 29, 1956. It was at all times contemplated that she should be managed under requisition by the defendants, the owners, and accordingly on requisition the then crew of the vessel provided by Silver Line were discharged and a fresh crew obtained by the defendants. Silver Line had crewed the vessel with Lascars; the crew quarters were not regarded as suitable for a European crew, and the defendants provided her with a Chinese crew whom they obtained from Hong Kong at a cost of £11,724. Their reasons for so doing were partly that the defendants' officers were accustomed to Chinese crews and not to Lascars, and partly because they thought that in view of the attitude adopted by India and Pakistan in the Suez crisis it would be undesirable to have a crew who were either Moslems or Indians. I find (in case it may be relevant if this action goes further) that in all the circumstances this was a reasonable course to adopt.

On September 10 the defendants, in common with all other shipowners whose vessels were requisitioned, entered into an agreement on terms contained in a pro forma charterparty with the Ministry of Transport providing for the rates of hire and management of the vessel by the defendants during the period of requisition. Requisition in fact continued until November 28, 1956, when the vessel was released to the defendants. This was in fact a little over three months from August 22 when notice of requisitioning was given, and it is also agreed by the parties that on August 22 a reasonable estimate of the probable duration of the requisition was a period of three to four calendar months. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line despite the latter's contention that the plaintiffs' time charter with them was frustrated.

Negotiations ensued between the plaintiffs and defendants as a result of which agreement was reached as to the future employment of the vessel without prejudice to their respective rights in respect of the period of requisition. It is with this period alone, therefore, that this action is concerned. A settlement has also been reached between the plaintiffs and Silver Line Ltd., with the result that I am not today concerned with any claims by the plaintiffs against Silver Line for breach of the plaintiffs' gross time charter with that company. The only issue which I have to determine is as to the respective rights of the plaintiffs and the defendants to the compensation or requisition hire which the defendants have received from the Crown in respect of the use of the vessel from August 29 to November 28, 1956.

The plaintiffs contend: (1) that throughout the relevant period they had a valid and subsisting contract with Silver Line Ltd.; (2) that by virtue of that contract they were entitled, as against the defendants, on the principle laid down in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*,[1] to have the vessel used for the carriage of their goods; (3) that they are entitled to recover from the defendants (a) under the Compensation (Defence) Act, 1939, if it applies, the whole compensation, or alternatively, the bareboat element of the compensation, received by the defendants in respect of the requisition, or (b) if the Compensation (Defence) Act, 1939, does not apply, a portion of the compensation, such portion being ascertained in accordance with the principles laid down by Lord Parker in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[2] and applied in *Chinese Mining and Engineering Co. Ltd.* v. *Sale & Co.*[3] and other cases; or (c), as an alternative to (a) and (b), the profits made by the defendants out of the requisition of the vessel.

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[1] [1926] A.C. 108; 42 T.L.R. 86.

The defendants challenge these contentions to the polls and to the array. The plaintiffs' contract with Silver Line Ltd., they say, was frustrated by the requisition; the *Strathcona* case[4] was wrongly decided; even if rightly decided it applies only where the subsequent purchaser has express notice of the terms of a subsisting charterparty; in any event it lays down no principle which entitles the plaintiffs to have the vessel used for the carriage of their goods, and it imposes no obligation on the defendants to account as constructive trustees; the Compensation (Defence) Act, 1939, applies, but gives no rights to the plaintiffs. The *Tamplin* case[5] apportionment is excluded by the Compensation (Defence) Act, 1939, and in any event does not apply. It is conceded that if the defendants are right as to the plaintiffs' gross time charter being frustrated by the requisition, their claim must fail.

The requisition in this case took place not under any statutory powers but under the prerogative power of the Crown, a fact which is not without some relevance on the question of frustration, since the Crown's power to retain possession of ship under the prerogative extends only for such period as possession is needed for the defence of the realm, although of this the Crown is no doubt, in the absence of mala fides, the sole judge. A requisition under the prerogative power is, therefore, necessarily a temporary taking of possession, although the period of possession may be lengthy. It is, however, agreed in this case that on August 22 it would have been reasonably expected that the requisition would last three to four calendar months, as in fact it did. No proclamation or Order in Council is required to entitle the Crown to exercise its prerogative power of requisition, and none had been published by August 22 when notice of requisition of the vessel was given to the defendants. In fact, however, an Order in Council, the Requisition of Ships Order, 1956, regulating the requisition of ships had been made on August 3, but was not published until August 28 when it appeared in the "London "Gazette." I shall have to look at its terms later to see what provision it makes for compensation.

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[2] [1916] 2 A.C. 397; 32 T.L.R. 677.

[3] [1917] 2 K.B. 599; 33 T.L.R. 464.

[4] [1926] A.C. 108.

[5] [1916] 2 A.C. 397.

Those being the circumstances, the question poses itself neatly: is a time charter for 30 months of which a little over 17 months have expired and a little under 13 months remain to be fulfilled frustrated by a requisition which would be expected to and does in fact last three to four months, and accordingly leaves about 10 months at the end of the requisition when the vessel will be available for use in performing services under the charter? It would appear to be the fate of frustration cases when they reach the highest tribunals that either there should be agreement as to the principle but differences as to its application, or differences as to the principle but agreement as to its application. I do not propose to add to what, according to Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council*,[6] had already become by 1919 an anthology of phrases by venturing on any restatement of the principle myself. Lest it be thought, however, that I do not remain an unrepentant adherent of the "implied term" theory of frustration, I would add that I have carefully considered the terms of the plaintiffs' charter, including in particular the "off-hire clause," and have borne in mind that at the time the charter was entered into the Compensation (Defence) Act, 1939—at which I shall have to look later—was in force, and provided in effect for the apportionment between the owner and time charterer of compensation payable by the Crown in respect of requisition.

I think, however, that whichever of the many suggested tests are applied, the result in this case is the same. Whether one applies the practical test favoured by Lord Loreburn in *Tamplin's* case[7] that in the case of a time charter, if the requisition is likely to last for substantially less than the remaining period of the charterparty, the contract is not frustrated, or whether one asks oneself with Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*[8]: Was the interruption one which was likely to be so long as to destroy the identity of the work or service, when resumed, with the work or service interrupted?—which was Lord Sumner's favourite of his anthology in *Bank Line Ltd.* v. *Arthur Capel & Co.*,[9] the answer in this case must, I think, be that this charterparty was not frustrated. It is also the answer which MacKinnon L.J.'s "officious bystander" (see *Shirlaw* v. *Southern Foundries* (*1926*) *Ltd.*[10]) would I think have received at the time the contract was made had he posed the question to Silver Line and Port Line, or to two disembodied and unincorporated reasonable shipowners (see *per* Lord Radcliffe in *Davis's* case [11]) entering into a contract in similar terms.

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[6] [1956] A.C. 696, 727; [1956] 2 All E.R. 145.

[7] [1916] 2 A.C. 397.

[8] [1918] A.C. 119; 34 T.L.R. 113.

[9] [1919] A.C. 435; 35 T.L.R. 150.

Finally, if however reluctantly I had to ask myself the metaphorical question: "Was the basis of the contract overthrown" by the requisition (see *per* Lord Reid in *Davis's* case [12]), or less metaphorically, is the contract not wide enough to apply to the new situation,[13] my answer still would be no, and the law accordingly did not step in to terminate the contract when the vessel was requisitioned, or at any time during the requisition.

In the result I hold that at all material times there was a valid and subsisting contract between Silver Line and the plaintiffs for breach of which (if there was any breach during the period of requisition) the plaintiffs could recover damages from Silver Line. But that is a claim with which I am not concerned. What is said, however, is that by virtue of that contract the plaintiffs were entitled as against the defendants, Ben Line, to have the vessel used for the carriage of their goods.

The plaintiffs' charterparty with Silver Line was a gross time charter, not one by demise. It gave the plaintiffs no right of property in or to possession of the vessel. It was one by which Silver Line agreed with the plaintiffs that for 30 months from March 9, 1955, they would render services by their servants and crew to carry the goods which were put on the vessel by the plaintiffs: see *per* MacKinnon L.J. in *Sea and Land Securities Ltd.* v. *William Dickinson & Co. Ltd.*[14] By parting with their property in the vessel on February 8, 1956, and retaining a right to possession and use which terminated on its requisition, Silver Line put it out of their power to continue to perform their contractual services after the vessel was requisitioned. It is true that during the period of requisition (which is the only period with which I am concerned) Silver Line could not have performed their contractual services to the plaintiffs anyway, but the plaintiffs would have been entitled under section 4 (3) of the Compensation (Defence) Act, 1939, to the bareboat element of any compensation received by Silver Line from the Crown, and would have had to pay to Silver Line a rather larger sum by way of hire under the charterparty. It would seem, therefore, that so far as the period of requisition itself is concerned, the plaintiffs would have gained rather than lost by any breach of the contract by Silver Line which relieved the plaintiffs from paying to Silver Line the chartered hire. This, however, is a matter between Silver Line and the plaintiffs with which I am not called upon to deal except in so far (if at all) as it may be relevant to the determination of the plaintiffs' rights against the defendants. There was no privity of contract between the plaintiffs and the defendants. On what ground, therefore, can they assert against the defendants all or any of the contractual rights they had against Silver Line, or any statutory rights which they would have had against Silver Line by virtue of the existence of such contractual rights?

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[10] [1939] 2 K.B. 206, 227; 55 T.L.R. 611; [1939] 2 All E.R. 113.

[11] [1956] A.C. 696, 728.

[12] Ibid. 719.

[13] Ibid. 721.

[14] [1942] 2 K.B. 65, 69; 58 T.L.R. 210; [1942] 1 All E.R. 503.

It is contended that the plaintiffs' rights against the defendants stem from the principle laid down by Knight Bruce L.J. in *De Mattos* v. *Gibson*[15] in 1858 as approved by the Privy Council in the *Lord Strathcona* case.[16] The principle laid down by Knight Bruce L.J. in *De Mattos* v. *Gibson*[17] in granting on appeal an interlocutory injunction to restrain a mortgagee of a ship who had acquired his mortgage with knowledge of the plaintiffs' subsisting charterparty from interfering with the performance of a subsisting voyage charter was in the following oft-quoted terms[18]: "Reason and justice seem to prescribe "that, at least as a general rule, where a man, by gift or "purchase, acquires property from another, with knowledge of "a previous contract, lawfully and for valuable consideration "made by him with a third person, to use and employ the "property for a particular purpose in a specified manner, the "acquirer shall not, to the material damage of the third person, "in opposition to the contract and inconsistently with it, use "and employ the property in a manner not allowable to the "giver or seller." In 1858 this was new law. In *Tulk* v. *Moxhay*[19] decided 10 years before, on which Knight Bruce L.J.'s statement has been assumed to be based, Lord Cottenham L.C.'s ratio decidendi was based on the retention by the covenantee of land the value of which would be diminished by breach of the covenant. Turner L.J., who sat with Knight Bruce L.J. in the interlocutory appeal in *De Mattos* v. *Gibson*,[20] gave a separate

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[15] (1858) 4 De G. & J. 276.

[16] [1926] A.C. 108.

[17] 4 De G. & J. 276.

[18] Ibid. 282.

[19] (1848) 2 Ph. 774.

[20] 4 De G. & J. 276.

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judgment which was subsequently treated as correctly propounding the questions to be determined at the trial, and expressed no concurrence with Knight Bruce L.J.'s reasons. When the action came for trial before the Lord Chancellor,[21] Lord Chelmsford L.C. did not grant an injunction. It would appear on analysis of his judgment that he treated the right to an injunction as depending on the same principle as the right to damages in *Lumley* v. *Gye*,[22] decided five years before, namely, that it is a tort knowingly to procure a breach of contract by another person.

De Mattos v. *Gibson*[23] was followed five years later with expressed reluctance by Wood V.-C. in *Messageries Imperiales Co.* v. *Baines*,[24] but I am inclined to think on the principle laid down by Lord Chelmsford L.C. rather than that laid down by Knight Bruce L.J. The broad principle as laid down by Knight Bruce L.J. applies to all species of property—real property, chattels and choses in action alike. It was applied (or at any rate treated as correct) in a number of cases relating to each of those species up to the turn of the century, but as a doctrine dependent upon notice alone was finally discredited in *London County Council* v. *Allen*.[25] Scrutton L.J. there shed a tear over its demise as respects real property, but five years later in *Barker* v. *Stickney*[26] he regarded the period of mourning as over, and his judgment conveniently lists (and so saves me from citing) the cases which he considered had buried it as respects each class of property. In 1926, however, it rose from the grave in the *Strathcona* case[27] which, being a decision of the Privy Council, is not binding upon me, but being one of a Board which included Lords Haldane, Wrenbury and Blanesburgh, in addition to Lord Shaw, is (so far as it deals with questions of equity) entitled to respect which in a common law lawyer borders upon awe.

It may be relevant to note that in the *Strathcona* case[27] the buyers of the vessel subject to the time charter in favour of the plaintiffs had express notice of the terms of the charter, and had covenanted with the sellers to perform and accept all responsibilities under it. It was, as the Board said,[28] not a mere case of notice of the existence of a covenant affecting the use of the property sold, but a case of acceptance of the property expressly sub conditione. The initial emphasis on this, and the reference at

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[21] (1859) 4 De G. & J. 284, 288 et seq.

[22] (1853) 2 E. & B. 216.

[23] 4 De G. & J. 276.

[24] (1863) 7 L.T. 763.

[25] [1914] 3 K.B. 642.

[26] [1919] 1 K.B. 121.

[27] [1926] A.C. 108.

[28] Ibid. 116.

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a later stage to the possibility that a shipowner might declare himself a trustee of his obligations under a charterparty so as to bind his assignee might suggest as a possible ratio decidendi that the *Strathcona* case [29] was one where either the purchaser used expressions which amounted to a declaration of trust in favour of the charterers, or the vendor himself accepted the benefit of the covenant as trustee for the charterers. But an examination of the Board's opinion as a whole seems to indicate that they accepted the full doctrine of Knight Bruce L.J. as respects chattels, namely, that mere notice does give rise to the equity, the only qualification that the Board imposed being that [30] " an " interest must remain " (sc. in the person seeking the remedy) " in the subject matter of the covenant before a right can be " conceded to an injunction against the violation by another of the " covenant in question." The only remedy which the Board in terms recognized is a remedy by injunction against the use of the ship by the purchaser inconsistent with the charterparty, but they said,[31] in a passage on which Mr. Roskill for the plaintiffs strongly relies, that the purchaser " appears to be plainly in the position " of a constructive trustee with obligations which a court of " equity will not permit him to violate."

These passages pose several problems: (1) If, as the Board state,[32] the ship is the " subject-matter " of the covenant of which the violation by another is to be restrained, it is difficult to see in what sense a charterer under a gross time charter has an interest in that subject-matter except in the broad sense that it is to his commercial advantage that his covenantor should continue to use the ship to perform the services which he has covenanted to perform. But the time charter is a contract for services. The time charterer has no proprietary or possessory rights in the ship, and if the covenantee's commercial advantage in the observance of the covenant is sufficient to constitute an " interest " in the chattel to which the covenant relates, it is difficult to see why the principle does not apply to price fixing cases such as *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[33] The Board [34] explain cases like *Dunlop's* case,[35] which had been cited to them, as cases where the plaintiff had no interest in the subject-matter of the contract. They say [36] that the charterer has and will have during the continuance of the

[29] [1926] A.C. 108.
[30] Ibid. 122.
[31] Ibid. 125.
[32] Ibid. 123.
[33] [1915] A.C. 847; 31 T.L.R. 399.
[34] [1926] A.C. 108, 121.
[35] [1915] A.C. 847.
[36] [1926] A.C. 108, 123.

charterparty " a plain interest " (in the ship) " so long as she is " fit to go to sea." Plain though it may be, if the expression " interest " is used colloquially, the Board nowhere explain what the legal nature of that interest is.

(2) Whether the reference to the subsequent purchaser with notice as being, also " plainly," in the position of a constructive trustee imports that equity provides other remedies against him by his cestui que trust, such as the right to an account, the making of a vesting order or the appointment of a new trustee is nowhere discussed in the *Strathcona* case [36]; but the whole trend of the opinion, the actual order made and the observation of the Board [37]: " It is incredible " that the owners will lay up the vessel rather than permit its " use under the contract " all strongly suggest that the only remedy in the view of the Board that the charterer acquired against the subsequent purchaser was the purely negative remedy, namely, to restrain a user of the vessel inconsistent with the terms of his charter with the former owner, and the obligations of the purchaser which a court of equity will not allow him to violate are the negative obligation not to make such inconsistent user of the vessel. As a " constructive trustee " the subsequent purchaser seems to be one sui generis, and I should hesitate as a common law lawyer to seek to devise other remedies against him which did not apparently occur to the Board.

(3) The Board in the *Strathcona* case,[38] beyond saying that that case was not one of " mere notice," did not discuss what kind of notice to the purchaser of the charterer's rights gives rise to the equity, namely, whether at the time of his acquisition of his interest in the vessel he must have actual knowledge of the charterer's rights against the seller, the violation of which it is sought to restrain, or whether " constructive " notice " will suffice. " Reason and justice "—the sole though weighty grounds on which Knight Bruce L.J. based the equity—do not seem to me to prescribe the introduction into commercial matters such as the sale of a ship of the doctrine of constructive notice. I respectfully agree with Lindley L.J.'s observations in *Manchester Trust* v. *Furness*.[39] Furthermore, as between vendor and purchaser of real property, where the doctrine has been developed, constructive notice—like estoppel in less esoteric matters—is a shield not a weapon of offence. It protects an already existing equitable interest from being defeated by a

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[37] [1926] A.C. 108, 123, 125.

[38] [1926] A.C. 108.

[39] [1895] 2 Q.B. 539, 545.

purchaser for value without notice. It is not itself the source of an equitable interest.

The *Strathcona* case,[40] although decided over 30 years ago, has never been followed in the English courts, and has never come up for direct consideration. In *Clore* v. *Theatrical Properties Ltd.*[41] Lord Wright M.R. suggested in passing that it might be peculiar to ships, but no such suggestion is to be found in the *Strathcona* case[40] itself. In *Greenhalgh* v. *Mallard*[42] Lord Greene M.R., in a judgment concurred in by Luxmoore L.J. and Goddard L.J., was clearly of opinion that it was wrongly decided, although it is only fair to add that as recently as 1952, Denning L.J. gave it a not unfriendly passing glance in *Bendall* v. *McWhirter.*[43]

It seems, therefore, that it is in this case for the first time after more than 30 years that an English court has to grapple with the problem of what principle was really laid down in the *Strathcona* case,[44] and whether that case was rightly decided. The difficulty I have found in ascertaining its ratio decidendi, the impossibility which I find of reconciling the actual decision with well-established principles of law, the unsolved and, to me, insoluble problems which that decision raises combine to satisfy me that it was wrongly decided. I do not propose to follow it. I naturally express this opinion with great diffidence, but having reached a clear conclusion it is my duty to express it.

If I am wrong in my view that the case was wrongly decided, I am certainly averse from extending it one iota beyond that which, as I understand it, it purported to decide. In particular, I do not think that it purported to decide (1) that anything short of actual knowledge by the subsequent purchaser at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain, is sufficient to give rise to the equity; (2) that the charterer has any remedy against the subsequent purchaser with notice except a right to restrain the use of the vessel by such purchaser in a manner inconsistent with the terms of the charter; (3) that the charterer has any positive right against the subsequent purchaser to have the vessel used in accordance with the terms of his charter. The third proposition follows from the second; ubi jus, ibi remedium. For failure by the subsequent purchaser to use the vessel in accordance with the terms of the charter entered into by his seller there is no remedy by specific performance as was held in the *Strathcona* case[44] itself. There is equally no remedy in damages, a consideration which distinguishes the *Strathcona* case[44] from such cases as *Lumley* v. *Wagner*[45] and *Lumley* v. *Gye*.[46] The charterer's only right is coterminous with his remedy, namely, not to have the ship used by the purchaser in violation of his charter.

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[40] [1926] A.C. 108.

[41] [1936] 3 All E.R. 483, 490.

[42] [1943] 2 All E.R. 234.

[43] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[44] [1926] A.C. 108.

I must, however, still deal with the third step in the plaintiffs' contentions since, as formulated by Mr. Roskill, they are not exclusively dependent on the correctness of the decision in the *Strathcona* case.[47] The defendants received requisition hire under the terms of the requisition charterparty entered into with the Crown. It is not now contended by the defendants that upon their entering into the pro forma (whatever that may mean) charterparty with the Crown, the vessel ceased to be under requisition: see *The Broadmayne*.[48] Curiously enough, the Order in Council of August 3, the Requisition of Ships Order, 1956, regulating the requisition, provides that the "owner" of the requisitioned vessel shall receive such payment and compensation "as "may be provided by any enactment relating to payment or "compensation in respect of the exercise of powers conferred by "this order and, in the absence of such an enactment, such payment or compensation as may be agreed . . . or, failing such "agreement, as may be determined by arbitration." Except for the reference to an enactment, this bears a close similarity to the similar clause in the Proclamation of 1914, and in this context the expression "owner" would appear to include any charterer: see *per* Lord Parker in *Tamplin's* case.[49] Since, however, Her Majesty has not yet by Order in Council declared that the original emergency which was the occasion of the passing of the Compensation (Defence) Act, 1939, has come to an end, it would appear from section 1 of that Act that it remains in force, and from the definition of emergency powers (in section 17 (1)) to include "any "power exerciseable by virtue of the prerogative of the Crown" that the Act covers the requisition of the *Port Stephens*, and that by the terms of the Order in Council regulating the requisition and by section 15 of the Act, as well as under the principle in *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*,[50] compensation is payable by the Crown in accordance with the Act, and not otherwise.

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[44] [1926] A.C. 108.
[45] (1852) 1 De G.M. & G. 604.
[46] 2 E. & B. 216.
[47] [1926] A.C. 108.
[48] [1916] P. 64; 32 T.L.R. 304.
[49] [1916] 2 A.C. 397.
[50] [1920] A.C. 508; 36 T.L.R. 600.

Section 4 of the Act, which deals with compensation in respect of requisition or acquisition of vessels, in subsection (1) splits the compensation into various elements of which the first in paragraph (*a*) may be conveniently described as the bareboat hire, the second in paragraph (*b*) the expenses of management if undertaken by the owner or by the person who but for the requisition would be entitled to possession of the vessel, and the fifth in paragraph (*e*) the expenses reasonably incurred for the purpose of compliance with any directions given by Her Majesty in connexion with the requisition. " Owner " is defined in section 17 (1) as the " person " entitled to sell the property, it being assumed not to be subject " to any mortgage, pledge, lien or other similar obligation." The defendants were thus clearly the " owners " of the vessel at the time of requisition. Subsection (2) provides that the bareboat element of the compensation " shall be considered as accruing due " from day to day during the period for which the vessel . . . is " requisitioned . . . and be apportionable in respect of time " accordingly, and shall be paid to the person who, at the time " when the compensation accrues due, is the owner of the " vessel. . . ." Subsection (3), however, provides as follows: " Where, on the day on which any compensation accrues due by " virtue of paragraph (*a*) of subsection (1) of this section,"—that is the bareboat element—" a person other than the owner of the " vessel . . . is, by virtue of a subsisting charter or contract of " hiring, the person who would be entitled to possession of, or to " use, the vessel . . . but for the requisition, the person to whom " the compensation is paid shall be deemed to receive it as trustee " for the first mentioned person."

The plaintiffs contend that this subsection constitutes the defendants trustees for the plaintiffs of all compensation or, alternatively, the bareboat element of the compensation received by the defendants. I say no more of their claim to the whole of the compensation save that it will be still open to them to advance it to a higher and possibly more receptive tribunal than myself. I do not understand it.

Their claim to the bareboat element I do understand. It is said in the first instance, independently of the *Strathcona* principle,[51] that the plaintiffs were the persons who, by virtue of a subsisting charter (namely, their gross time charter with Silver Line) would be entitled to use the vessel but for the requisition. I agree that in this context the expression " entitled to use the vessel " must include "entitled to require the person who has or is entitled to "possession of the vessel to use the vessel," for otherwise it would exclude all charterers other than charterers by demise, and since persons "entitled to possession of the vessel" are already expressly included, the words "or to use" would be otiose. But the relevant time for seeing whether the plaintiffs have any rights under the subsection is after the requisition has taken effect. At that time, although the plaintiffs had a subsisting charter from Silver Line, Silver Line had not got possession of the vessel and were not entitled to possession of the vessel, and the plaintiffs' own charter from Silver Line was not one which entitled them to use the vessel, or to require the person who had or was entitled to possession of the vessel to use it. It was by then no different from any other charter executed by someone who had no interest in the vessel. It is quite true that if the vessel had never been requisitioned, the plaintiffs would have been entitled to require the persons entitled to possession of the vessel to use it, for Silver Line's bareboat demise charter would not have determined. But the expression "but for the requisition" must in this context mean "but for the fact that the possession by the Crown under "requisition was subsisting at the time the compensation "accrued due"; and Silver Line's right to possession as against the owners of the vessel eo instanti when the vessel was requisitioned, and even if the requisition were terminated a few months afterwards, would not revive. I hold, therefore, that, so far as their claim under the subsection against the defendants as statutory trustees is advanced independently of the *Strathcona* principle,[51] it fails.

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[51] [1926] A.C. 108.

If I am right in my view that the *Strathcona* case[51] was wrongly decided, this disposes of the plaintiffs' claim under the subsection, as is also the case if I am right in thinking that the *Strathcona* case[51] (even if rightly decided) applies only in the case of actual knowledge of the subsequent purchaser at the time of the purchase of the charterer's right which in the result is violated—for it is agreed that the defendants had no actual knowledge of the terms of the plaintiffs' charter with Silver Line. But even assuming that the principle laid down in the *Strathcona* case[51] does apply, and the plaintiffs are entitled to avail themselves of it, it still does not assist them under the section, since in my view it gives the plaintiffs no positive rights against the defendants to have the vessel used in accordance with the terms of their charterparty with Silver Line. It merely gives them a right to restrain inconsistent user by the defendants, and this is not sufficient to bring them within the section as a person who by virtue of a subsisting charter would be entitled to use the vessel.

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[51] [1926] A.C. 108.

For these reasons I think that any claim by the plaintiffs as against the defendants as statutory trustees of the compensation money under section 4 (3) of the Compensation (Defence) Act, 1939, fails.

Mr. Mocatta advanced other arguments why the plaintiffs' claim under the Act should fail, including the argument that since an agreement was reached between the defendants and the Crown as to compensation, the operation of section 4 (3) was excluded by section 15. I should be sorry to think that this particular argument was right, but it and the others that he advanced will be open to him if necessary elsewhere.

Since I have held that the compensation payable for the requisition is payable in accordance with the Act and not otherwise, the plaintiffs' alternative claim under the principles laid down by Lord Parker in *Tamplin's* case[52] does not arise. As it must be founded on some positive right to the use of the ship by application of the *Strathcona* case[53] principle, I should in any event reject it.

Finally, there is the plaintiffs' contention that independently of the Act or the *Tamplin's* case[52] principle the defendants are bound to account as constructive trustees for any profit they have made out of the requisition of the vessel. This is based on an extension of the *Strathcona* case,[53] and asserts a right to all equitable remedies against the defendants on the basis that they were constructive trustees of the vessel.

As is obvious from what I have already said, in my view this claim fails: (1) Because the *Strathcona* case[53] was wrongly decided; (2) because, even if it was rightly decided, the defendants do not come within its principles as they had no actual knowledge at the time of their purchase of the plaintiffs' rights under their charter; (3) because, even if it was rightly decided, and the defendants come within its principles (a) they were in breach of no duty to the plaintiffs since it was by no act of theirs that the vessel during the period of requisition was used inconsistently with the terms of the plaintiffs' charter—it was by act of the Crown by title paramount—and (b) the plaintiffs are not entitled to any remedy against the defendants except a right to restrain the defendants from using the vessel in a manner inconsistent with the terms of the charter.

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[52] [1916] 2 A.C. 397.

[53] [1926] A.C. 108.

This interesting action—in which I have been very much indebted to counsel for their clear and learned arguments—therefore fails at least so far as this court is concerned.

Judgment for the defendants.

Solicitors: *William A. Crump & Son; Holman, Fenwick & Willan.*

C. J. E.

ATTORNEY-GENERAL *v.* SMITH AND OTHERS.

[1957 H. No. 599.]

1958
June 5.

Lord Goddard C.J.

Town and Country Planning—Enforcement notice—Non-compliance—Development without permission—Whether lawful—Relator action—Injunction—Caravan site—Retrospective application for permission refused—Appeal to Minister—Removal of caravans to another site after dismissal of appeal—Repeated applications for permission and appeals in respect of other sites—Whether development without permission unlawful—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12 (1), 18, 23.

Injunction—Relator action—Act conferring public benefit—Course of conduct showing intention to use machinery of Act to evade its provisions—Jurisdiction of court to grant injunction—Town and Country Planning Act, 1947, *ss.* 12 (1), 18, 23.

On March 28, 1955, the first defendant, without obtaining planning permission, began to use land of which he was the owner as a site for caravans. On April 23, after an enforcement notice, pursuant to section 23 of the Town and Country Planning Act, 1947, had been served on him, he applied for planning permission to develop the land as a caravan site, and the operation of the enforcement notice was thereby suspended.[1] Permission was refused

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[1] Town and Country Planning Act, 1947, s. 12 (1): "Subject to "the provisions of this section and "to the following provisions of this "Act, permission shall be required "under this Part of this Act in "respect of any development of land "which is carried out after the "appointed day."

S. 18: "(1) The power to grant "permission to develop land under "this Part of this Act shall include "power to grant permission for the "retention on land of any buildings "or works constructed or carried out "thereon before the date of the application, or for the continuance of "any use of land instituted before "that date (whether without permission granted under this Part of this

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Attorney-General v. Smith.

and the defendant appealed to the Minister. On December 31, the Minister dismissed the appeal. By that time it had been made clear to the defendant that planning permission had not been refused by reason of any objection to the site, but because it was the policy of the local planning authority not to allow caravan sites in their district, as it was part of the Green Belt, but on June 20, 1956, another application for planning permission was made, which was refused. The caravans remained on the site and on September 5, 1956, the defendant pleaded guilty to an offence under section 24 (3) of the Act and was fined £25. On October 7, after a summons applying for a daily penalty had been served, the caravans were removed to a second site in a next-door field, and on October 10 the defendant was again convicted and fined £2. On November 6 the defendant applied for planning permission in respect of the second site, which application was refused. On January 26, 1957, the second defendants (a company of which the defendant was one of two directors) applied for planning permission to develop a third site, on a nearby farm belonging to the third defendant, as a site for caravans, and about the same time some of the caravans moved on to that site. The application was refused and the company appealed to the Minister. On March 11, 1957, the Attorney-General, on the relation of the local urban district council, the planning authority, issued a writ for an injunction restraining the defendants from using or causing or permitting to

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"Act or in accordance with permission so granted for a limited period only); and references in this Part of this Act to permission to develop land or to carry out any development of land, and to applications for such permission, shall be construed accordingly. (2) Any such permission as is mentioned in the foregoing subsection may be granted so as to take effect from the date on which . . . the use was instituted, . . ."

S. 23: "(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission . . . the local planning authority may . . . if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section. (3) . . . an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein: Provided that—(*a*) if within the period aforesaid an application is made to the local planning authority . . . for permission . . . for the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission . . . is granted on that application, the notice shall not take effect;"

S. 24 (3): "Where, by virtue of an enforcement notice, any use of land is required to be discontinued . . . then if any person, without the grant of permission . . . uses the land or causes or permits the land to be used . . . in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding fifty pounds; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding twenty pounds for every day on which the use is so continued."

be used as a caravan site any land within the boundaries of the council without the prior grant of planning permission under the Act.

By about March 25, 1957, all the caravans had moved to the third site. On July 26 the Minister dismissed the appeal in respect of that site and subsequently two further applications for planning permission, one relating, at least in part, to the same site, and the other to an adjacent site on the same farm, were made. Both applications were refused and appeals brought against the refusals were dismissed by the Minister on April 24, 1958. Enforcement notices in respect of the use of the third site had been served on October 23, 1957, but at the date of the hearing of the action the caravans were still there. The relator council alleged that, by moving from one unauthorized site to another in the district the defendants were flouting the enforcement provisions of the Act and bringing the law into disrepute. The defendants contended that development without permission was not in itself unlawful, and that, since no offence was committed under the Act until an effective enforcement notice had been contravened, they were not acting in breach of the Act in taking advantage of the procedure laid down by it:—

Held, that under section 12 (1) of the Act any development of land carried out without planning permission was unlawful and contrary to the Act, and that, therefore, since the defendants' course of conduct in using the machinery of the Act, not for making genuine applications for planning permission, but for the purpose of delay, showed an intention to act in defiance of and to evade the provisions of the Act so far as and for as long as they could, and as the Act was one which was designed for the public benefit, the Attorney-General was entitled to the injunction sought.

Attorney-General v. *Wimbledon House Estate Co. Ltd.* [1904] 2 Ch. 34; 20 T.L.R. 489 and *Attorney-General* v. *Bastow* [1957] 1 Q.B. 514; [1957] 1 All E.R. 497 applied.

ACTION.

On March 28, 1955, the first defendant, Joseph Sidney Claude Smith, began to use land belonging to him at Retreat Farm, Egham, as a caravan site by allowing five caravans to come on to the land. No planning permission had been sought or obtained and on April 12, 1955, the Egham Urban District Council, acting for the local planning authority under the Town and Country Planning Act, 1947, served on him an enforcement notice pursuant to section 23 of the Act requiring the discontinuance of the use of the land as a caravan site on or before May 16, 1955. On April 23 the defendant applied to the council for planning permission to develop the land as a caravan site, thereby suspending the operation of the enforcement notice.[1] On May 25 the application was refused and on July 18 the defendant appealed against that refusal to the Minister of Housing and Local Government. On September 20, by which time there were 60 caravans on the site, a public local inquiry was held and on December 31 the Minister gave his decision dismissing the appeal, but expressing the hope that the council would time any action necessary for the enforcement of the decision so as not to cause undue hardship to persons resident in the caravans and to give them reasonable opportunity to make arrangements to move. By that time it had been made clear to the defendant that planning permission had been refused, not because of any particular objection to the site, but because the district was in the Green Belt. On May 3, 1956, the caravans were still on the site and the council served a further enforcement notice taking effect on June 30, 1956. The defendant took no steps to comply with the enforcement notice but on June 20 made another application for planning permission for a temporary period of three years, submitting a new scheme and lay-out for the same site. On August 9 that application was refused and on August 14 the council issued a summons against the defendant for non-compliance with the enforcement notice. The summons was heard on September 5, when the defendant pleaded guilty and was fined £25 and ordered to pay £5 5s. costs. No steps were taken to comply with the enforcement notice and on September 26 the council issued a further summons applying for the daily penalty. That summons was returnable on October 10, 1956; but on October 7 the caravans were moved to another site, Maindy, in an adjoining field, and at the hearing of the summons the defendant pleaded guilty and was fined £2 with £3 3s. costs.

On November 6, 1956, the defendant applied for planning permission in respect of the Maindy site, which application was refused on January 15, 1957. On January 25 a direction made by the council (and duly approved by the Minister) under article 4 of the Town and Country Planning General Development Order, 1950, excluding from the general permission contained in article 3 of the order the use of any vacant land in the urban district of Egham as a caravan site for a temporary period of 28 days without the grant of planning permission was advertised and came into force. Meanwhile, on November 29, 1956, the second defendants, Modern Trailer Homes Ltd., of which the first defendant was one of the two directors, was formed. On January 26, 1957, an application was submitted on behalf of the defendant company to develop nearby land, part of Royal Hythe Farm, the property of the third defendant, Beatrice Pearlberg, as a site for caravans. On about the same date some of the caravans started to move on to the Royal

Hythe Farm site and the council erected warning notices outside the entrance that it had not been approved as a site for caravans. On February 6, 1957, the application for planning permission in respect of the Royal Hythe Farm site was refused. On February 9 an appeal was made against the refusal of planning permission in respect of the Maindy site and on February 13 the council served an enforcement notice.

On March 11, 1957, the Attorney-General issued a writ at and by the relation of the council claiming an injunction restraining all three defendants and each of them by themselves, their servants or agents or otherwise from using or causing or permitting to be used as a caravan site any land within the boundaries of the urban district of Egham without the prior grant of planning permission under the Town and Country Planning Act, 1947.

By about March 25, 1957, all the caravans on the Maindy site had been removed to the Royal Hythe Farm site and the first defendant informed the council of the withdrawal of his appeal in respect of the Maindy site and that his interest in that land had ceased. Meanwhile the defendant company had appealed to the Minister against the refusal of planning permission in respect of the Royal Hythe Farm site; by March 28 there were 119 caravans on the site and by April 3, 156. On June 4, 1957, a public local inquiry was held and on July 26 the Minister dismissed the appeal. Subsequently two applications for planning permission, one relating, in part at least, to the same site, and the other to an adjacent site on Royal Hythe Farm, were made on behalf of the defendant company. Both applications were refused and on October 23 enforcement notices were served. On November 30, 1957, notices of appeal against the refusal of those applications were given; another public local inquiry was held on February 10, 1958, and on April 24, 1958, the Minister dismissed the appeals.

The plaintiff alleged that since March, 1955, the first defendant had despite enforcement proceedings under the Act persistently and unlawfully used or permitted to be used as a caravan site land within the urban district of Egham and now jointly with the second and third defendants unlawfully used or caused or permitted to be used as a caravan site land the property of the third defendant at Royal Hythe Farm, and that by reason of their conduct in moving from one unauthorized site to another in that district the defendants were flouting the enforcement provisions of the Act and were bringing the law into disrepute. The defendants denied those allegations.

R. E. Megarry Q.C., *Neil McKinnon Q.C.* and *Andrew Leggatt* for the relator council. The defendants' course of conduct shows that they are using the machinery of the Town and Country Planning Act, 1947, in order to evade its provisions. The normal methods of enforcement of planning control provided by the Act have failed to produce discontinuance of the use of the defendants' land as a caravan site and, in the circumstances, the court has jurisdiction to grant the injunction sought. Section 12 (1) of the Act provides that " permission shall be required " in respect of any development of land; that is a clear, direct statement and amounts to a general statutory requirement that planning permission must be obtained before any development is carried out. If therefore, as here, development is carried out without the prior grant of planning permission the Act has not been complied with. It is true that section 18 makes provision for permission to be applied for after development has taken place, but this is not a case of retrospective permission, and no permission has been or (as they knew) would be granted to the defendants.

In *Attorney-General* v. *Bastow* [2] an injunction issued against a defendant who had persisted in retaining caravans on a particular site. It is appreciated that there is a distinction between the facts of that case, where there was a series of convictions, and the present case, where there has been a continual moving from site to site in order to avoid conviction, but a number of convictions are not a necessary preliminary to the granting of an injunction in relator proceedings: see *Attorney-General* v. *Wimbledon House Estate Co. Ltd.* [3] (where there had been only one conviction and the general statutory provision was analogous to section 12 (1) of the Act of 1947) and *Attorney-General* v. *Ashborne Recreation Ground Co.* [4] (where there had been no conviction at all); see, also, *Attorney-General* v. *Sharp* [5] approving both those decisions.

J. Ramsay Willis Q.C. and *B. Wingate-Saul* for the defendants. The court has no jurisdiction to grant the injunction claimed. Section 12 (1) of the Town and Country Planning Act, 1947, does not say that permission shall be required " before any development " is carried out " but " in respect of any development," and its words should not be equated with " it shall be unlawful to carry " out any development unless permission has been previously " granted." Such a construction would be inconsistent with section 18 which clearly envisages the carrying out of development without permission and makes provision for applications to be made for ex post facto permission to regulate the position. It is submitted that the words "permission shall be required" should be construed to mean "if permission is needed" and that development without permission, or when permission has been refused, merely puts the developer to the risk of having the development prohibited if the planning authority acting administratively so decide.

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[2] [1957] 1 Q.B. 514; [1957] 1 All E.R. 497.

[3] [1904] 2 Ch. 34; 20 T.L.R. 489.

[4] [1903] 1 Ch. 101; 19 T.L.R. 39.

[5] [1931] 1 Ch. 121; 46 T.L.R. 554.

There can be no breach of a statute unless the statute says that an offence is committed. Under the Act of 1947 that point is not reached until after the planning authority have taken advantage of the provisions of section 23 and served an enforcement notice and the penal provisions of section 24 (3) have been brought into operation by the use of land in contravention of an effective enforcement notice. But whether or not permission is refused is an administrative matter for the planning authority, and the Minister on appeal, and until an enforcement notice is served and is effective, there can be no offence. Development without planning permission, therefore, is not in itself unlawful and the defendants in taking advantage of the administrative procedure laid down by the Act were not acting in breach of it.

Attorney-General v. *Bastow*[6] should be distinguished. The decision in that case depended upon the fact that a number of offences had been committed and that the defendant had acted in complete defiance of the law; the facts therefore were such that the courts had cognizance of the case as a criminal matter, whereas here the planning authority and the Minister have cognizance of this case as a purely administrative matter. In *Attorney-General* v. *Sharp*[7] there had been a series of convictions; and in *Attorney-General* v. *Ashborne Recreation Ground Co.*[8] and *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*,[9] which lead up to the decision in *Attorney-General* v. *Bastow*,[10] there had been a breach of a statute involving an offence and the injunction issued to restrain the breach taking place again. [Reference was also made to *Attorney-General* v. *London and North Western Railway*,[11] *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*[12] and *Attorney-General* v. *Cockermouth Local Board*.[13]] To grant an injunction in terrorem covering a large area such as is sought here would be a very wide extension of the principle in those cases, for

[6] [1957] 1 Q.B. 514.

[7] [1931] 1 Ch. 121.

[8] [1903] 1 Ch. 101.

[9] [1904] 2 Ch. 34.

[10] [1957] 1 Q.B. 514.

[11] [1900] 1 Q.B. 78; 16 T.L.R. 30.

[12] (1882) 21 Ch.D. 752.

[13] (1874) L.R. 18 Eq. 172.

until the applications for planning permission had been finally determined nobody could say whether what had been done would become subject to the penal provisions of section 24 (3), and up to that stage the defendants had done nothing which they were not entitled to do.

If, as a matter of law, an injunction could issue in the circumstances of this case then it is submitted that it is not a case in which the court should exercise its discretion to grant an injunction. The defendants were entitled to apply for planning permission; up to the time when the enforcement notice in respect of Retreat Farm became effective no offence was committed and there has been no conviction in respect of the site at Royal Hythe Farm; there is nothing, therefore, to justify the conclusion that the defendants have acted or intend to act in deliberate defiance of the law.

R. E. Megarry Q.C. was not called on to reply.

LORD GODDARD C.J. This is an action by the Attorney-General, on the relation of the Egham Urban District Council, claiming an injunction restraining the defendants from using or causing or permitting to be used as caravan sites any land within the boundaries of the Urban District Council of Egham without previous planning permission.

The matter arises out of the provisions of the Town and Country Planning Act, 1947. It is (as I think everybody knows) a somewhat difficult Act in many respects; and the procedure laid down under it is very cumbersome in that a considerable time must very often elapse before the questions whether there has been "development" or whether permission will be granted can be finally determined, and a resolute defendant can make use of that state of affairs and may very likely develop land for certain purposes—and in this case we are concerned only with caravans, which seem to have a particular attraction for the provisions of the Act—and be able to take advantage of the delays which the Act permits, so as to use land contrary to the terms of the Act, for a considerable period before the matter is finally decided.

The machinery of the Act is this. Section 12 (1) provides that "Subject to the provisions of this section and to the following "provisions of this Act, permission shall be required under this "Part of this Act in respect of any development of land which "is carried out after the appointed day." The sense of that section is obvious: it is that development of land carried out without permission is unlawful—it is contrary to the Act. But it does not follow, because it is contrary to the Act, that a penalty is incurred at once.

The scheme of the Act is that before you develop land you must apply for permission, and if you do not apply for permission, but nevertheless do any work on the land or make any use of it which can amount to "development" within the meaning of the Act, you do so at your own risk. An application for permission has to be made. If that permission is refused—and no doubt some time must elapse between the time when it is applied for and the time when the planning authority comes to a decision—an appeal lies to the Minister; and there are then provisions requiring the Minister to send down an inspector to hold an inquiry. That takes time. Then the inquiry is held: the inspector has to make a report: the report has to be considered by the Minister—and then a decision has to be given.

The time which all these things take is well illustrated by what happened with regard to the first of the sites with which we are dealing. The matter first started about April 12, 1955, when an enforcement notice was served alleging that the land had been used without permission—as it had been—since March 28; and the final decision was not given until December 31, so that nine months elapsed between the time when the site was first used without permission and the time when the Minister decided the matter in favour of the council—because the Minister's holding did amount to a decision that the council were justified in refusing permission.

Section 23 of the Act provides that if the planning authority consider that any work does amount to development for which no permission has been given they may serve an enforcement notice requiring the owner or occupier of the land to cease from putting the land to the use to which it is being put or to cease from doing the particular acts which amount to development. But directly an application for planning permission is made the enforcement notice is stayed until after the final determination of the application and is therefore stayed until after the appeal has been heard, so that in this case the enforcement notice was suspended for nearly nine months. If the Minister finally dismisses the appeal the enforcement notice, however, remains good and then, if the land continues to be used in contravention of the enforcement notice, the planning authority may issue a summons on which the magistrates may impose a fine of up to £50 for the breach and a fine of £20 for every day on which, after the conviction, the use of the land continues without permission.

It seems that in March, 1955, the first defendant conceived the idea of using his farm, Retreat Farm, in Chertsey, for the purpose of a caravan site. It was not only going to be a site for just a few caravans, but it was quite obvious that he was minded to use it as a caravan, I was going to say "town," for it was obviously going to be for a great many caravans. The caravans were not being put there for the purpose merely of holidays but for the purpose of people living in them permanently.

By the Town and Country Planning General Development Order, 1950, the Minister granted a general permission to use land for certain purposes, as, for instance, the siting of caravans for a period of not more than 28 days in any one year, and therefore if a farmer allows somebody to use land as a caravan site for a month during the summer holidays he will not be brought within the Act. But article 4 of the order gives the planning authority power, subject to the Minister's approval, to make a direction excluding that permission with regard to any particular district or place, and in fact such a direction was made here. It is perfectly obvious that the policy of the council, their district lying, as it does, within what is known as the "Green Belt," is to prohibit the use of land for caravan sites, or caravan towns, or whatever one may like to call them, within their district. I have not the least doubt, in the circumstances of this case, that the defendants knew that perfectly well. The first defendant may not have known it when he first started, in March, 1955, to bring caravans on to the land, but I am quite sure that within a very short time he must have known that that was the deliberate policy of the council, and he set himself out to ignore that policy. If he could legally do that, he would be entitled to, and no one would attach any moral blame to him for that, but at the same time, he was taking on a very considerable risk, not only for himself but also for the people who were living in these caravans as permanent dwellings. It is a very serious thing, if planning permission is required and has not been obtained, to let these sites to unfortunate individuals who come there presumably in the belief that there is power to have the caravans where they are, and then find themselves in jeopardy of being turned out.

The history of the defendants' efforts to establish these caravan places in face of the refusal of planning permission is this. The first piece of land with which we are concerned, Retreat Farm, was first used on March 28, 1955, when five caravans were brought there. On April 12, 1955—within a fortnight—the council served an enforcement notice, to expire on May 16, requiring the removal of the caravans.

Under section 18 of the Act retrospective permission may be given for development which has been carried out without permission (or, as may easily be done, in ignorance of the requirements of the Act); so the defendant applied, on April 23, for permission to use this land, and to continue to use it, for a caravan site. On May 25 that permission was refused, so that he knew by then, at any rate, that that was the attitude which the council were likely to take up. There was nothing to show that their attitude had anything to do with the particular site. It may be that the defendant thought at the time that it had, although he has not told us so, but it must have become perfectly clear, as the history of the case developed, that the objection of the council was much more than to any particular site: it was because they are within the Green Belt and they were therefore determined not to have one of these mushroom towns springing up.

On July 18 the defendant appealed to the Minister, and on September 20 an inquiry was held. On December 31 the appeal was dismissed by the Minister, who made it quite clear that he was not upholding the decision of the council on the ground that there was some particular objection to the particular site, but that there was an objection to these caravan towns, or caravan settlements, going up in the council's district near Chertsey because it was in the Green Belt. The Minister, in dismissing the appeal, expressed the hope—he did not make it any condition—that the council would act reasonably and not too precipitately, because it involved the dispersal of these unfortunate people who had taken themselves to this caravan site and then found that the planning authority would not allow them to remain. The council certainly did act with great restraint, and it was not until May 3, 1956, that they served another enforcement notice to take effect on June 30. So that the defendant had had from December 31 to June 30 to comply with the notice—he had six months in which to get the land cleared of these caravans.

On June 20, hope, I suppose, springing eternal in the mortal breast, he made a further application for permission. He did not know, but quite obviously he could expect that it would be refused, as it was, on August 9. On August 14 the planning authority, who by this time thought, no doubt, that the first defendant was simply defying them, issued a summons which was returnable on September 5. The magistrates convicted the first defendant and imposed a fine of £25 and costs—which considering the defiance (practically) which he had shown, was certainly a very moderate fine.

The first defendant did not pay any attention to that but still kept the caravans on his land at Retreat Farm, and on September 26 the council took out a summons for the daily penalty. I expect that that made him think, for as the daily penalty was £20, a very considerable sum had already mounted up. So he got his caravans out; on October 7 they were moved to the next-door field. That simply meant that he was going to keep the caravans. As he had been turned off one site he was going to take another site. So he moved from one field to another, and there, on a site called Maindy, he installed the caravans. On November 6, after they had been there for a month without permission, he applied again for permission, and on January 15, 1957, it was refused. He may have thought (or I will assume that he thought) that he could use Maindy for a further 28 days under the general permission in the General Development Order, but on January 25, 1957, the direction made by the council under article 4 of the order came into force.

On February 9 the first defendant appealed to the Minister against the refusal of planning permission in respect of the Maindy site. On February 13 an enforcement notice was served, taking effect on March 16. But by March 25 the caravans had gone. The defendant said that he had parted with any interest that he had in the land, because by this time, apparently, he had got the idea of going to another adjoining site which is referred to as Royal Hythe Farm. The history with regard to Royal Hythe Farm is this. The defendant company, of which the first defendant was a director, had now come into the picture, and on January 26, 1957, applied for planning permission; it was here that warning notices saying that the site was an unauthorized site were put up and on the very day on which permission was applied for the caravans started to move in. A very considerable number had moved in by February 6, the date when planning permission was refused. That did not daunt the defendant because, by March 28, there were 119 caravans there, and by April 3, 156. By this time an appeal had been made to the Minister, and the council had applied to the court for an interim injunction; but when the summons came before the judge in chambers, no order was made because counsel gave an undertaking that no more caravans would be moved on to the site. But there they were: there were 156. On June 4 another public inquiry was held and on July 26 the appeal was again dismissed.

On August 29 application was made to put the caravans on another part of Royal Hythe Farm, moving them quite a short distance. This really shows that it was getting to be, I might almost say, something in the nature of a scandal, because everybody knew by this time that it was not the particular field that was objected to but that the council were not going to have these caravan sites. On September 18 that application was refused. The undertaking had been given; but the applications and appeals went on.

The writ in this action was issued on March 11, 1957, but I have mentioned the matters which happened after that date as showing that the defendants intended to hold the Act at defiance as far as they could by going on making these repeated little moves from one field to another, or from one part of the farm to another part of the farm, and then applying for permission which they knew they would not get, and then appealing to the Minister and then getting an inquiry, so that they could get 15 or 16 months' grace, during which they could let caravans be on the site and could take the profits from them. On October 23 further enforcement notices were served. On November 30 there was an appeal to the Minister, and that appeal followed the way of all the other appeals and the Minister refused to disturb the decision of the council.

It has been submitted to me that because the Act provides penalties, and because there is no offence committed before an enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases which have been cited—particularly *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*,[1] cited and followed by Devlin J. in *Attorney-General* v. *Bastow* [2]—show that, although a statute may provide a penalty for acts done in breach of it, if it is a matter of public right, then the Attorney-General is entitled, on behalf of the public, to apply for an injunction. The Town and Country Planning Act, 1947, is an Act which is designed to confer a benefit on the public: it is for the orderly development of the countryside, to prevent unsightly development, to prevent the development of too crowded areas, to prevent the development of industrial buildings and plant in what should be a residential district, and for the mapping out of residential districts and industrial districts and so forth. It is obviously an Act which is designed for the public good and can be used for great public advantage. Therefore, if a defendant shows by his conduct that he intends to avoid the Act and act in breach of it so far as he can and for as long as he can, then the Attorney-General is entitled to an injunction such as was granted in the cases which have been cited to me.

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[1] [1904] 2 Ch. 34; 20 T.L.R. 489.

[2] [1957] 1 Q.B. 514; [1957] 1 All E.R. 497.

In this case I think that it is quite clear that the defendants having got their caravans on to a particular site, started by carrying on a fight with regard to that for a good many months. The first defendant carried on that fight from March to December; then, although the appeal had been dismissed, he took no notice; but—because the council acted reasonably so as to allow the unfortunate people living in the caravans time to get out—managed to carry on the fight for another six months. So that from March, 1955, to the end of September, 1956, the defendant had the advantage of letting caravan sites, which he had developed without permission, and permission for which had been withheld all the way through: he got a run, therefore, of somewhere near 18 months. It is clear that by moving the caravans to the field next door he meant to continue using land for this purpose, which was a development for which he had no permission. It was only when he found that he could not get any further with that site—although he managed to keep the caravans there from October 7 till March 24, so he had another pretty good run—that the defendants decided to go to Royal Hythe Farm, and they have been using the Royal Hythe Farm site for caravans since January 26, 1957, and I understand the caravans are still there, although the Minister dismissed the appeal on July 26. That shows an intention by the defendants, who have been refused planning permission time and time again, to act in defiance of the Town and Country Planning Act, and to use its machinery not for the purpose of making genuine applications for permission but for the purpose of delay. In the first instance I would not say that the first defendant was not perfectly entitled to appeal to the Minister, but when he got the result of the appeal the defendants knew quite well that the Minister was upholding the policy which the council were evidently following—that is to say, not to permit the use of land for caravans within their area because it was in the Green Belt. The Minister upheld that policy and yet the defendants went on in this way.

I think, therefore, that this is a case in which I have jurisdiction to grant an injunction; and if I have such jurisdiction I most certainly, as a matter of discretion, will grant it. There will, therefore, be judgment for the plaintiff. The defendants must pay the costs of the action.

Order accordingly.

J. F. L.

Solicitors: *Champion & Co.; Clarke & Co.*

BEER *v.* DAVIES.

1958
April 28.

Lord Goddard C.J., Hilbery and Donovan JJ.

Road Traffic—Notice of intended prosecution—Service of notice—Notice sent by registered post to defendant's usual residence—Defendant away on holiday—Postman unable to deliver—Returned to police by post office—Not received by defendant within 14 *days of alleged commission of offence—Whether "served on or sent" to defendant—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

Statute—Construction—Service of document by post—Meaning of "sent" and "served"—Road Traffic Act, 1930, *s.* 21 (*c*).

An omnibus driver, who was involved in a minor road accident while driving his omnibus, gave his usual home address to the police officer who took particulars of the accident. He was given no warning of any proposed prosecution under Part I of the Road Traffic Act, 1930, but 10 days after the accident the police, under section 21 (*c*) of the Act,[1] sent to him by registered post at his usual address a notice of intended prosecution for careless driving. The defendant did not in fact receive the notice as he had gone away for a week's holiday, and as there was no one at his home to take delivery of registered post the notice was returned by the post office to the police marked accordingly. The police served no notice of intended prosecution on the defendant's employers, the registered owners of the omnibus, but served a duplicate notice on the defendant on his return to his home some days after the statutory period had expired. In a prosecution for careless driving the magistrate took the view that the terms of section 21 (*c*) as to the service of the notice had not been complied with, and that the proviso had no application. He, accordingly, dismissed the information. On appeal by the police:—

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[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an "offence under any of the provisions "of this Part of this Act relating . . . "to reckless or dangerous driving, "and to careless driving he shall not "be convicted unless either—(*a*) he "was warned at the time the offence "was committed that the question of "prosecuting him for an offence under "some one or other of the provisions "aforesaid would be taken into consideration; or (*b*) within fourteen "days of the commission of the offence "a summons for the offence was "served on him; or (*c*) within . . . "fourteen days a notice of the intended prosecution specifying the "nature of the alleged offence and "the time and place where it is "alleged to have been committed was "served on or sent by registered post "to him or the person registered as "the owner of the vehicle at the time "of the commission of the offence: "Provided that—(i) Failure to comply with this requirement shall not "be a bar to the conviction of the "accused in any case where the court "is satisfied that—(1) neither the "name and address of the accused "nor the name and address of the "registered owner of the vehicle, "could with reasonable diligence have "been ascertained in time for a summons to be served or for a notice "to be served or sent as aforesaid; "or (2) the accused by his own conduct contributed to the failure; and "(ii) the requirement of this section "shall in every case be deemed to "have been complied with unless and "until the contrary is proved."

Held, (1) that the requirements of section 21 (*c*) were not sufficiently complied with by the mere sending of the notice by registered post to the defendant's usual address. As the notice had not been delivered to him within the statutory period there had not been good service within the meaning of the section.

Reg. v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 1 Q.B. 682; (sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi*) [1956] 1 All E.R. 670 applied.

(2) That the police were not entitled to rely on the proviso to section 21 to excuse their failure to serve the notice, as (a) they took no steps to serve it on the registered owners of the vehicle, and (b) the defendant had not by his own conduct "contributed to the "failure" to serve the notice within the meaning of the proviso as he had done nothing, such as giving a false address, to prevent the police from serving the notice upon him.

Observations of Denning L.J. in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 1 Q.B. 682, 693 considered.

CASE STATED by a stipendiary magistrate.

On July 19, 1957, an information was preferred by the police against George Robert Davies, an omnibus driver employed by the London Passenger Transport Executive, alleging that on June 10, 1957, on a road in London, S.W.1, he unlawfully drove a motor vehicle without due care and attention contrary to section 12 (1) of the Road Traffic Act, 1930.

At the hearing of the information, after the whole of the evidence for the prosecution had been given, the defendant gave evidence on the question whether section 21 of the Act had been complied with by the prosecutor. On that issue the magistrate found the following facts. The defendant, when driving a London Passenger Transport omnibus at the time, date and place alleged in the information, was involved in a collision with a private motor-car. No personal injury was caused to the driver of either vehicle. A police officer took all appropriate particulars from both drivers and the defendant gave his correct address in London without adding any qualifications thereto. He was not warned at the time that the question of prosecuting him under one or other of the provisions of Part I of the Act relating to reckless, dangerous or careless driving, would be taken into consideration. A summons for the alleged offence was not served on him within 14 days of the alleged commission of it. On June 20, 1957, a proper notice of intended prosecution within the terms of section 21 of the Act was sent by registered post to the defendant at the address which he had given the police officer at the time of the accident. On June 27 the notice and its envelope were returned to the police by the General Post Office marked "Undelivered "for reason stated" and "No response to 739" [the postman's number]. The defendant did not in fact receive the notice because he was away from his home on holiday from June 15 to 22. Between those days there was no one in his home so no registered post could be taken in. The prosecutor made no inquiries as to the defendant's whereabouts nor did he consult the London Passenger Transport Executive who, to his knowledge, employed the defendant, and no notice of intended prosecution was served on the Executive as the defendant's employers, who knew that he was away on holiday and would not be returning to work until June 30 but did not know where he was or how to get in touch with him. On July 2, 1957, after the prosecutor had discovered on June 27 that the defendant was away, a police officer saw him at his home and personally served on him a second or duplicate notice and explained to him what had happened to the original notice.

It was contended on behalf of the defendant that the provisions of section 21 of the Act of 1930 had not been complied with in that (a) the second or duplicate notice was out of time and (b) the defendant did not in fact receive the original notice and must accordingly be acquitted. It was contended by the prosecutor that the original notice had been properly sent by registered post in time to the address given by the defendant and that since the police were unaware that the defendant was going on holiday section 21 had been complied with.

The magistrate, being of the opinion on this issue that the contentions of the defendant were correct and that the failure to comply with the requirements of section 21 were not due to any of the matters mentioned in the proviso thereto, dismissed the information.

The prosecutor appealed.

Paul Wrightson for the prosecutor. By section 21 of the Road Traffic Act, 1930, a notice of intended prosecution may be "sent by registered post to" the proposed defendant within 14 days of the commission of the alleged offence, and therefore all that the prosecutor has to show is that it was sent within time. Whether it was received or not does not matter. There is no authority which decides that such a notice sent by registered post to the usual home address of the proposed defendant is not sufficient compliance with the words of the section. The only exception is *Holt* v. *Dyson*,[2] where the notice, which was sent to the home address of the proposed defendant, was not received by her within the statutory period because she was in hospital and the police knew that she was. It was held that it was entirely the fault of the police that she did not receive the notice in time and that section 21 had not been complied with. That case is distinguishable, because here the prosecutor did not know where the defendant had gone and could not find out.

Henry Newman for the defendant. This appeal is misconceived. Throughout the case the prosecutor has failed to draw attention to a most material point, namely, that by virtue of section 26 of the Interpretation Act, 1889, the word "sent" only means "received" until the contrary is proved. If the defendant can prove that he did not receive the notice, then it has not been sent: see *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi*,[3] which applies exactly to the present case, although there the Court of Appeal had to consider the words "give notice" under section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933. It was held that the obligation had not been satisfied by adopting the permissive method of sending the notice by post in a letter which was proved never to have been received by the party interested. The reasons given in the judgment of Morris L.J.[4] are adopted as part of this argument.

Wrightson in reply. *Rossi's* case[5] is distinguishable because it concerns a different section of a different Act. Moreover, giving notice to a party to appear in court is a different thing from sending a notice of intended prosecution, the object of which is to give the defendant an opportunity of casting his mind back to the accident and refreshing his memory on the facts in order to prepare his defence. The meaning of the word "send" was determined long before *Rossi's* case [5] was decided: see *Stewart* v. *Chapman*,[6] which was not cited to the Court of Appeal in *Rossi's* case.[7] All the authorities hitherto appear to show that the sending of a notice of intended prosecution is sufficient compliance with section 21: see, in particular, *Sandland* v. *Neale*,[8] where the police thought it improper to serve a notice on a proposed defendant in hospital and sent it to him at his home address where his wife was. It was not personally received by the defendant until after the expiry of the 14-day period, but the Divisional Court held that it was immaterial whether he received it within the 14 days or not, because it was the sending and not the receipt of the notice that was decisive. That decision merely expresses what this court has said again and again in the past. If the court takes the other view, all those authorities will be nullified. As to the decision in *Rossi's* case,[9] the court should not take the same notice of a decision which purports to overrule a long line of authorities if those authorities were not cited to the court in the course of the case.

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[2] [1951] 1 K.B. 364; 66 T.L.R. (Pt. 2) 1009; [1950] 2 All E.R. 840.

[3] [1956] 1 Q.B. 682; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670.

[4] [1956] 1 Q.B. 682, 698.

[5] Ibid. 682.

In the present case, even if there was a failure to serve the notice on the defendant within the prescribed period, the prosecutor is entitled to rely on the proviso to section 21, because the defendant, by going away, put it out of the prosecutor's power to serve the notice on him. It is not suggested that he knew what was going to happen and evaded service, but if in fact he failed to tell the police that he was going away he did by his conduct contribute to the failure to serve the notice. The appeal should be allowed.

Lord Goddard C.J. This is a case stated by Mr. Blundell, one of the metropolitan magistrates, which raises once again this question under section 21 of the Road Traffic Act, 1930, which has frequently given this court trouble. [His Lordship stated the facts, read section 21 of the Act, and continued:] The result of the magistrate's findings was that a notice of intended prosecution was sent to the defendant within 14 days, but it was not delivered.

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[5] [1956] 1 Q.B. 682.

[6] [1951] 2 K.B. 792; [1951] 2 T.L.R. 640; [1951] 2 All E.R. 613.

[7] [1956] 1 Q.B. 682.

[8] [1956] 1 Q.B. 241; [1955] 3 All E.R. 571.

[9] [1956] 1 Q.B. 682.

The question is whether the notice has been "served" on him. Under section 21 it can be "served" by serving it upon him—that is, by personal service—or by serving it by registered post. Since other cases which have been decided in this court, and which I need not consider, the question of service has been considered by the Court of Appeal, it is true with regard to the service of a notice under a section of another Act. The question of service by post is dealt with by section 26 of the Interpretation Act, 1889, which provides: "Where an Act passed after the "commencement of this Act authorizes or requires any document "to be served by post, whether the expression 'serve,' or the "expression 'give,' or 'send' or any other expression is used, "then, unless the contrary intention appears, the service shall "be deemed to be effected by properly addressing, prepaying, and "posting a letter containing the document, and unless the con-"trary is proved to have been effected at the time at which the "letter would be delivered in the ordinary course of post." In *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi*,[1] the Court of Appeal seem to me to have decided that where a notice is served by registered post or is purported to be served by registered post, it is not enough to prove that it was correctly directed, stamped and posted. That is prima facie enough, but it can be shown that the letter was never delivered, and if it was never delivered then the Court of Appeal has said that there has not been service and that section 26 of the Interpretation Act does not assist. It is true that *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi*,[1] with which the Court of Appeal was dealing, did not concern the Road Traffic Act, 1930. There it was a question of an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here, because the section which the Court of Appeal was considering was section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, which provides for the giving of various notices, and states: "A notice required by "this subsection to be given to any person may be sent by "post in a registered letter addressed to him at his last or "usual place of abode." In that case the alleged putative father, the man who had been adjudged by the magistrate not to be the putative father, who was the respondent to the mother's appeal, had left the house where he had been living, and a notice was sent to him by registered post at the house which was his last known place of abode. He had gone away, and the letter was not taken in. The Court of Appeal held that there was no notice and reversed the decision of this court which held that there had been a notice. I am bound to say that one of the matters which caused this court to decide that there had been notice was that we thought the man was deliberately evading it, and had taken himself off so that the unfortunate woman could not know where he was. She knew where he ordinarily lived, and she sent the notice there, but it was proved that he had gone away. We thought that section 3 (1) had been complied with, but the Court of Appeal said that that was wrong. It is true that Denning L.J. did say in the course of his judgment[2]: "Evading service would "be a ground for ordering personal service or substituted service, "but not for dispensing with service altogether." With great respect to the Lord Justice, I know that there are many rules of the Supreme Court which deal with substituted service of writs or other proceedings. I do not know of any rule in the Magistrates' Courts Act, 1952, or anywhere else which allows for substituted service of notices which have to be given under the Acts which apply in those courts. It may be, in view of the expression of opinion of Denning L.J., that one may go to a court and ask for leave to serve a notice by substituted service. How that can be done in the case of an appeal to quarter sessions I have no knowledge. Is one to apply to the magistrates for leave to serve by substituted service, or to quarter sessions, which is the court which has to try the case, because quarter sessions probably will not be able to sit in time for the application to be made as they only sit so many times a year? I confess that I do not understand how substituted service can be effected, but at any rate there is the decision of the Court of Appeal that a notice sent by registered post but not delivered is not good service, and I do not see, therefore, that we can possibly hold otherwise in this case without disregarding the Court of Appeal's decision, though technically it may not be binding because it is a criminal cause or matter.

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[1] [1956] 1 Q.B. 682; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670.

After full argument, it seems to me that we are bound to decide that there has not been service in this case. The question then arises whether the proviso to section 21 is brought into play. [His Lordship read the proviso and continued:] Before the failure to serve can be excused the court has to be satisfied that neither the name nor the address of the defendant nor his employer could be ascertained, because section 21 provides that the notice can be sent by registered post to the person registered as the owner of the vehicle as well as to the actual driver at the time of the commission of the alleged offence; so it seems to be impossible to bring that part of the proviso into play because here the police certainly knew the registered owner of the vehicle, namely, the London Passenger Transport Executive. Of course, I quite understand their position. They naturally served the notice on the driver whose name and address they had. It was because the Post Office took some time to return it to them that they had not time then to serve the registered owner, but that is a matter of which the defendant can take advantage. We cannot rewrite the section. It is also said that the defendant by his own conduct contributed to the failure to serve the notice because he had given an address to the police and had not said that he was going to be away on a certain day. Whether or not he knew that he was going to be away, he at any rate would not know that he was going to be prosecuted. The object of this notice is to tell him that he is to be prosecuted. Still less would he know when the notice was going to be served upon him. I think the words "the accused "by his own conduct contributed to the failure" which appear in the proviso mean whether the accused had done something, such as giving a false address, which prevented the police from serving him.

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[2] [1956] 1 Q.B. 682, 693.

For these reasons I think that the magistrate came to a correct decision and the appeal fails.

HILBERY J. I am of the same opinion. Section 21 of the Road Traffic Act, 1930, is a section which provides certain restrictions on prosecutions under the preceding section, under which it is the duty of a driver to give his name and address. [His Lordship read section 21, referred to the facts and continued:]

For the reasons given by my Lord, I am of opinion that we cannot hold that there was in this case a sufficient giving of the notice of intended prosecution merely by sending the notice by registered post to the defendant at the address which was his usual address. We are clearly precluded from so doing, it seems to me, by the decision of the Court of Appeal in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi.*[3] I refer particularly to the judgment of Morris L.J. where I think the matter as to which we are precluded is made perfectly clear.

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[3] [1956] 1 Q.B. 682.

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Hilbery J.

After quoting the whole of section 26 of the Interpretation Act, 1889, to which I need not refer again, he refers to the Summary Jurisdiction (Appeals) Act, 1933, and says[4]: "The Act of 1933 "clearly permits or authorizes the giving of a notice as to a "hearing by sending a document by registered post. But if the "primary obligation of giving notice means in this context the "giving of some form of notice which reaches the party interested "so that he may be present or represented at a hearing, then "the permissive user of the post denotes a user so that notice "may reach the party interested so that he may be present or "represented at the hearing. It was therefore entirely proper "to send a notice to Mr. Rossi by registered post. Applying the "provisions of section 26 of the Interpretation Act, since no "contrary intention appears from the Act of 1933, the sending "of the notice to Mr. Rossi was deemed to be effected by "properly addressing, prepaying and posting the letter which "contained the document. Then by the concluding words of "section 26, the sending of the notice was deemed, unless the "contrary was proved, to have been effected at the time at "which the letter would have been delivered in the ordinary "course of post. But here the contrary was proved. It was "proved, not merely that the letter was not delivered in the "ordinary course of post but that the letter was not delivered "at all." For that reason the Lord Justice is saying that there was no compliance with the requirements of the Summary Jurisdiction (Appeals) Act, 1933, that a notice required by section 3 (1) to be given might be sent by post in a registered letter addressed to him at his last or usual place of abode. In those circumstances, it seems to me quite plain that we, too, are bound now to give that interpretation to these words in section 21 of the Road Traffic Act, 1930.

Mr. Wrightson then falls back upon the proviso, but that in my view on its plain language is a proviso which can only be used where there has been a failure to comply with the requirements of section 21 because "neither the name and address of "the accused nor the name and address of the registered owner "of the vehicle, could with reasonable diligence have been ascer- "tained in time for a summons to be served or for a notice to be "served or sent as aforesaid, . . ." Those words relate, of course, to the provision in section 21 that such a notice may be given to the person who has been driving the car or to the owner of the car and, those alternatives being open, in order to obtain the benefit of the proviso the police must show that neither of those alternatives was open to them by the exercise of reasonable diligence. Here that cannot be shown because by the exercise of less than diligence, since it was a public omnibus owned by the London Passenger Transport Executive, there was no difficulty about serving the notice on the owner.

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[4] [1956] 1 Q.B. 682, 697.

Finally, Mr. Wrightson relies upon the second part of the proviso, namely, that "the accused by his own conduct contributed to the failure," but here all that is shown is that the driver of the omnibus, the defendant, having given his correct address in the ordinary course of his employment, apparently went away on his annual holiday. He was not to know, because no warning had been given to him, that there might be a prosecution, that the police would be serving on him any such notice as is required by section 21. He was not in any sense taking any action to avoid service, and I think, without stating anything which would be regarded hereafter as binding on the construction of the words in the second part of the proviso, that it is enough to say that in my view at any rate what he did here did not amount to conduct which contributed to the failure of the police to serve on him the notice under section 21.

For these reasons I agree with the judgment of my Lord.

DONOVAN J. I agree with both judgments which have been delivered, and have nothing to add.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police; Geoffrey B. Gush & Co.*

E. M. W.

1958
May 20.
Devlin J.

COMPANIA CRYSTAL DE VAPORES OF PANAMA v. HERMAN & MOHATTA (INDIA) LTD.

Shipping—Charterparty—Demurrage—"Weather working days"—Tides—Ship's safety threatened by bore tides—Harbour master ordering ship out of berth for six days—Whether time lost "weather "working days"—Whether failure to load excused by harbour master's order—Illegality.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

1958

COMPANIA CRYSTAL DE VAPORES OF PANAMA *v.* HERMAN & MOHATTA (INDIA) LTD.

Contract—Illegality—Place of performance, by law of—Law or executive order—Temporary prevention—Loading of ship postponed.
Ships' Names—Maria G.

By a clause in a charterparty it was provided: "Cargo to be "loaded and stowed free of expense to the ship at the average rate "of 400 tons per weather working day." The vessel in question, after its arrival in Calcutta, the port of loading, was ordered by the harbour master to move from its berth, because he thought that it could become a danger during the bore tides if it remained there. The vessel did not return to the berth until six days later, during which time loading was discontinued. On the question whether the time thus lost in loading was to be included in the assessment of lay time:—

Held, (1) that, assuming the bore tides were "weather" within the charterparty, such threat of bad weather to the safety of the ship, which did not affect the actual operation of loading, was not sufficient to exclude a day from being a weather working day.

(2) That, assuming the shipowner in removing the vessel was acting voluntarily, the act of removal was caused by something beyond the shipowner's control and for which he was not to blame, and did not accordingly interrupt the running of the lay time.

Houlder v. *Weir* [1905] 2 K.B. 267; 21 T.L.R. 503 applied.

(3) That, while non-compliance with the harbour master's order would have been a breach of the local law, illegality was no excuse for the failure to load unless it prevented the act of loading; it was not enough to point to a law, which prevented loading during a particular part of the lay time, and, therefore, the time lost was to be included in the assessment of lay time.

Steamship "Induna" Co. Ltd. v. *British Phosphate Commissioners* [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522 applied.

Cantiere Navale Triestina v. *Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172; 41 T.L.R. 355 distinguished.

SPECIAL CASE stated by an umpire.

By a charterparty made between A. Lusi Ltd. of London, as agents for and on behalf of Compania Crystal De Vapores of Panama, the owners of the steamship *Maria G*, and Herman & Mohatta (India) Ltd. of Calcutta, the charterers, it was agreed that "the said vessel shall proceed to Calcutta or so near thereto "as she may safely get and lie always afloat, and there load a full "and complete cargo of skullscrap and/or allied scrap not exceeding 50 cubic feet bale per ton deadweight." By clause 5 of the charterparty it was provided that "cargo was to be loaded and "stowed free of expense to the ship at the average rate of 400 "(four hundred) tons per weather working day, Sundays and "holidays excepted, even if used."

Disputes having arisen under the charterparty, they were referred to arbitrators, who, being unable to agree, appointed an umpire. The umpire made his award in the form of a special case. He found the following facts:

The *Maria G* was a vessel of 335 feet 6 ins. in length with a beam of 46 feet 2 ins., 3,594 tons gross, 2360 tons net, registered at the port of Panama. The vessel on arrival at Calcutta on April 26, 1954, was ordered by the charterers to berth at the No. 1 Garden Reach Jetty, which berth was 600 feet in length. There was no evidence sufficient to justify a finding that the said berth was an unsafe berth. It was a normal berth and no objections were raised to the berth by the master of the *Maria G* at any time. Notice of readiness was tendered and accepted by the charterers on April 27, 1954, at 10.45 a.m. Loading commenced during the evening, and lay time commenced at 1 p.m. on April 29. The vessel loaded cargo day and night from April 28, until noon on April 30, when she shifted from No. 1 Garden Reach Jetty to King George Dock Buoys, where mooring was completed at 5 p.m. The vessel returned to No. 1 Garden Reach Jetty on May 6, in which berth she was secured at 10 a.m., whereupon loading was resumed. The vessel moved about 60 feet along Garden Reach Jetty to enable shore cranes to work Nos. 1 and 2 hatches; loading was completed on May 19. The vessel had been ordered by the harbour master to shift away from her berth at No. 1 Garden Reach Jetty to the King George Dock Buoys on April 30, because the harbour master was of the opinion that the vessel by reason of her overall length in relation to the jetty and the mooring facilities available at the jetty could become a danger during the bore tides, which were expected and in fact materialized between May 1, and May 5, 1954. The drafts of the vessel at the time of shifting on April 30, were: forward 7 feet 4 ins., aft 16 feet 5 ins., and mean 11 feet 10½ ins. The master of the vessel had not expected to be ordered out of the berth. Without knowledge of the mooring facilities at the Garden Reach Jetty, the reasons for the harbour master's actions were not apparent; but the harbour master was in the best position to judge and he was acting reasonably and, inter alia, for the safety of the vessel in ordering her away from the Garden Reach Jetty during the bore tides; further the vessel was in a safe position at the buoys in the King George Dock. The master of the *Maria G* was obliged to conform to the orders of the harbour master.

The question of law for the decision of the court was whether the time lost in loading between noon on April 30, to 10 a.m. on

May 6, was to be included in the assessment of lay time at the loading port.

On the assumption that the total of such time could properly be included in the statement of lay time, the amount of demurrage was £872 1s. 8d. If such time was to be excluded in calculating lay time at the loading port, it was agreed between the parties that there was due to the charterers the sum of £76 6s. in respect of dispatch. The charterers had in fact paid to the shipowners the sum of £867 1s. 8d. on June 2, 1954, in respect of demurrage.

Subject to the court deciding the question of law in the affirmative, the umpire found that the charterers were not entitled to claim a refund of the demurrage already paid by them and awarded the shipowners the sum of £5, the balance of demurrage.

If the court should answer the question of law in the negative he awarded the charterers the sum of £867 1s. 8d., being the amount of demurrage paid by them, and the sum of £76 6s., being the dispatch due to the charterers.

The umpire also made awards in respect of other items of dispute which are not the subject of this report.

R. A. MacCrindle for the shipowners. The issue is whether the shipowners are entitled to demurrage. In a fixed lay time charterparty the charterers are obliged to load within the period stipulated unless they are protected by the exceptions clauses or prevented by default of the shipowners or by the law of the place of loading. Reliance is placed on the general principle stated by Lord Finlay in *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa.*[1] Here the vessel was compelled to shift from the loading berth on orders of the harbour master. It was prevented from loading for the period it was absent from the loading berth, but that was not the vessel's fault. In *Houlder* v. *Weir*[2] the shipowner stopped the loading of the vessel to take in ballast for the vessel's safety; it was held that lay time continued during the interruption of loading. *Houlder* v. *Weir*[2] is authority for two propositions: (1) lay time does not necessarily terminate because the shipowner does something that prevents loading; (2) the shipowner is entitled, in the absence of exceptions clauses, to the running of the lay time if what he has done was in the vessel's interests.

The vessel in *Cantiere Navale Triestina* v. *Russian Soviet*

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[1] [1920] A.C. 88, 94; 35 T.L.R. 709.

[2] [1905] 2 K.B. 267; 21 T.L.R. 503.

Naphtha Export Agency [3] was ordered by the harbour authority to leave the port; she left, but subsequently returned, and it was held that lay time ran throughout and that compulsion to leave was no excuse.

In the *Triestina* case [3] *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*,[4] where the freight payable under the contract was above the maximum permitted by the law of the place of performance and the excess over the permitted amount was held irrecoverable, was held to have no application. Pollock M.R.[5] clearly stated that the principle of the *Ralli* case does not apply to fixed time charters. In the *Ralli* case there was an illegality directly affecting the contract. In the *Triestina* case there was only an indirect illegality in that the executive authorities prevented loading. There was no suggestion of direct legislative action against loading. Even if there had been, it would not have constituted a sufficient illegality. In *Steamship "Induna" Co. Ltd.* v. *British Phosphate Commissioners* [6] the vessel discharged in New Zealand, where there was a law against night work. It was held that the charterers were not excused from their failure to discharge within the time stipulated by the charterparty. There was an illegality, but it did not operate on the contract. There was no law preventing the discharge of 1,500 tons per day as required by the contract; the prevention of the discharge at that rate was an indirect effect of a particular law.

The present is not the type of case to which the *Ralli* case applies. If that be wrong, there is here only a temporary interruption in the loading due to the exercise of a discretion vested in the executive authority, analogous to the *Cantiere* case. Moreover, it falls within the type of case envisaged by Sellers J. in the *Induna* case. Though the contractual obligation was indirectly rendered incapable of performance, there was no direct effect on the contract. It might have been physically possible by very fast loading to have completed the loading before the vessel was ordered to shift. It would be unfortunate if the absolute obligation of a fixed charterparty laid down by the authorities were to be further qualified.

Basil Eckersley for the charterers. Lay time does not run if the vessel moves from the selected place of loading in circumstances in which no fault attaches to the charterers. The right

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[3] [1925] 2 K.B. 172; 41 T.L.R. 355.

[4] [1920] 2 K.B. 287; sub nom. *Sota and Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

[5] [1925] 2 K.B. 172, 202.

[6] [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522.

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to challenge the decision in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*[7] is reserved. *Houlder* v. *Weir*[8] is distinguishable; first, because the ballast was regarded as a necessary part of the operation of discharge, and, secondly, because the taking in of the ballast was for the joint safety of the vessel and the cargo. There is no suggestion in the present case of safety for the cargo.

[DEVLIN J. Anything done for the safety of the ship must also be for the safety of the cargo.]

If the reason for the vessel's departure is purely for the safety of the vessel and there is no threat to the cargo, time does not count against the charterers.

The master of the *Maria G* was obliged to conform to the orders of the harbour master, who had the legal power to insist on the vessel's departure. This case is distinguishable from the *Cantiere* case,[9] where the orders of the harbour authorities were simply executive action. The *Induna* case[10] was also very different from the present case. The impact of the foreign law here was of a more serious character. There was no possibility of work for six days once the harbour master had given his order. If a day is reduced by four hours as a result of a prohibition against night work, it does not necessarily follow that charterers cannot comply with their obligations during the day. But it is quite different if six days are eliminated altogether.

The loss of time in the present case was due to the weather. Since this was a weather working day charterparty, the charterers are excused from their failure to load in the six days. An ordinary tide would not be weather, but the bore tides are entirely different. They are tidal waves, associated in the Orient with hurricanes and typhoons. The loading was threatened by the weather in the guise of a succession of tidal waves. To regard the six days as weather working days would be an affront to a business man's sense of propriety. [Reference was made to *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co. S.A. of Havana*,[11] *Bennetts & Co.* v. *Brown*[12] and Carver's Carriage of Goods by Sea, 10th ed., p. 838.] In *Dampskibsselskabet Botnia A/S* v. *C. P. Bell & Co.*[13] a vessel was prevented from loading a cargo of timber because of ice. The days so lost were held to be not weather working days; the *Botnia* case shows that weather must be construed reasonably broadly.

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[7] [1925] 2 K.B. 172.

[8] [1905] 2 K.B. 267.

[9] [1925] 2 K.B. 172.

[10] [1949] 2 K.B. 430.

[11] [1955] 1 Q.B. 430; [1955] 1 All E.R. 457.

[12] [1908] 1 K.B. 490; 24 T.L.R. 199.

[13] [1932] 2 K.B. 569; 48 T.L.R. 93.

R. A. MacCrindle in reply. The only difference between this and the *Induna* case [14] is that, whereas in the latter small amounts of the lay time were taken away at night, here a large amount of the lay time was taken away at one time. The harbour master's order was not directed against loading; he would have complained if the vessel remained without loading. The complaint was against the vessel remaining in the berth, not against the vessel loading. The illegality arose from a combination of facts, but there was no direct legislative provision against fulfilment of the contract.

The *Botnia* case [15] is wholly understandable. Ice is caused by the cold and is the result of atmospheric and meteoric conditions. The tides are predictable and occur whether the weather is good or bad. They are seasonal and predictable and have nothing to do with the weather. In *Bennetts & Co.* v. *Brown* [16] loading was prevented because of surf: the custom of the port was that days lost because of surf were not weather working days. But even that custom was rejected by the court, which held that it was contrary to the natural meaning of the words to say that surf was weather. No one suggested, apart from the custom, that surf was weather.

[DEVLIN J. I find it difficult to follow that, if surf is not weather, ice is.]

Ice arises as a result of something meteorological—a fall in the temperature. The tides arise irrespective of weather. The point about the weather was not taken before the umpire. It is not therefore open to be taken now.

DEVLIN J. stated the facts and continued: The question of law which is stated in the case for my decision is "whether the "time lost in loading between noon on April 30, 1954, to 10 "o'clock on May 6, 1954, is to be included in the assessment of "lay time." The lay days were still running when the vessel was moved. It is expressly found that she was not on demurrage on April 30, when she moved to the King George Dock Buoys.

I think that, logically, the first question that arises (although it does not appear to have been a point that was expressly taken before the umpire) is on the point that has been argued by Mr. Eckersley as to whether these six days were or were not weather working days. He submits that they were not weather working days and, if that be right, then they ought not to be counted as lay time within the meaning of clause 5. Two questions seem to me to arise. First, is a bore tide, that is, something in the nature of a tidal wave, "weather," so that if the work on a particular day is prevented by a bore tide it ceases to be a weather working day? Secondly, if the position is, as it is here, not that the bore tide actually prevented the loading of the ship or, indeed, that it would have prevented the loading of the ship if she remained in the berth—there is no finding as to that fact—but that the threat of the bore tide upon the safety of the ship was such as to make it reasonable for her to leave the berth, are the days when she is absent from the berth weather working days?

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[14] [1949] 2 K.B. 430.

[15] [1932] 2 K.B. 569.

[16] [1908] 1 K.B. 490.

I have had cases cited to me on both sides as to the meaning of "weather" for this purpose, whether surf is "weather" and whether ice is "weather"; but I find it simpler to decide this point upon the second of the questions which I have set out, and I shall assume, without deciding it, that a bore tide is "weather" within the meaning of this clause. But no case has been cited to me in which a mere threat of bad weather has been held to make a day not a weather working day and certainly no case where the threat of bad weather has affected not the operation of the actual work of loading, but the safety of the ship in the particular place in which she was. In my judgment, the expression "weather working days" cannot be construed so widely as to cover the circumstances of this case. The expression is used in relation to a berth—that is, it is assumed that the vessel will be in a safe berth and it is contemplated that, notwithstanding the safety of the berth, the weather may interfere with the actual work of loading.

That point therefore fails and the consequence of its failure is that the familiar principle of law has, prima facie, to be applied. That principle is conveniently stated in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*,[1] upon which Mr. MacCrindle relied. Pollock M.R. in his judgment said [2]: "The contract contained in the charterparty is absolute" —that is the contract with the charterer to load within the lay days—"It contains the phrase: 'The laying days shall commence "'from the time the steamer is ready to receive or discharge "'her cargo . . . berth or no berth.' Hence the vicissitudes "which are incurred are prima facie deemed to be at the risk

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[1] [1925] 2 K.B. 172; 41 T.L.R. 355.

[2] [1925] 2 K.B. 172, 196.

"of the charterers. . . . The rule as to liability generally is stated ". . . by Lord Finlay[3] as follows: 'If the charterer has agreed "'to load or unload within a fixed period of time . . . he is "'answerable for the non-performance of that engagement, what- "'ever the nature of the impediments, unless they are covered "'by exceptions in the charterparty or arise through the fault "'of the shipowner or those for whom he is responsible.'"

It was sought to argue in the present case that the charterers could be excused on a principle which was set out in Scrutton on Charterparties, 11th ed., p. 342, in the following terms: "If the "ship has to be removed from the port, or becomes unfit for "loading or discharging, e.g., by reason of a collision, the period "of such removal or unfitness will be cut out from the period of "demurrage." That statement of law was held by the Court of Appeal in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*[4] to be incorrect. I mention it because Mr. Eckersley desired to reserve the point for argument in any court in which he is permitted to argue it that that statement which had been adopted by Roche J. in the court below is a correct statement of law. But he has, of course, accepted that I am bound by the decision in the Court of Appeal. The result is, therefore, that there being nothing in this charterparty which gives the charterers an express exception to the lay time clause, they must show that failure to load within the lay time arose through the fault of the shipowner or those for whom he is responsible.

Since the ship was in fact removed in the middle of the loading, it is for the owners to show that the removal was justified. They say it was for two reasons: first, it was necessary for her safety because of the danger of the bore tides and, secondly, the harbour master ordered it. As to the first, the charterers reply that it was not necessary for the safety of the cargo and therefore not justifiable. As to the second, they say that the harbour master's orders had the force of law. The importance of that point is because of the distinction between illegality at the place of performance as illustrated in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*[5] and restraint of princes. Was the loading stopped because it would be illegal to continue with it, or was it stopped simply because the harbour master, as a local authority physically in a position to enforce compliance with his orders, decided that it should be? If the latter, it seems that on the authority of *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*[6] the lay days would continue to run; but if the former, the position in law is still unsettled, and Mr. Eckersley submits that the point should be decided in favour of the charterers.

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[3] *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* [1920] A.C. 88, 94.

[4] [1925] 2 K.B. 172.

[5] [1920] 2 K.B. 287; sub nom. *Sota and Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

Before I deal with these two matters of law, I must consider the relevant findings in the case. There is a composite finding of fact on both points. The umpire clearly found some difficulty in understanding why the harbour master thought that it would be unsafe for the vessel to remain in No. 1 Garden Reach Jetty. In paragraph 12 of the award he says: "I have been referred to "pp. 177–189 inclusive of the Bay of Bengal Pilot, 7th ed. (1940), "but without knowledge of the mooring facilities of the Garden "Reach Jetty the reasons for the harbour master's actions are not "apparent. I find, however, that the harbour master was in the "best position to judge and I accept that he was acting reasonably "and, inter alia, for the safety of the vessel in ordering her away "from the Garden Reach Jetty during the bore tides: also that "the vessel was in a safe position at the buoys in the King George "Dock. The master of the *Maria G* was obliged to conform to "the orders of the harbour master."

These findings are not exactly in point in relation to the two matters I have to consider. The umpire does not find expressly that the threat of the bore tides was such that it was reasonable for the ship to be removed. What he finds is that the harbour master was in the best position to judge and he, the umpire, accepts that he was acting reasonably and, inter alia, for the safety of the vessel in ordering her away from the Garden Reach Jetty during the bore tides. Mr. MacCrindle has invited me to construe that as a finding that, leaving aside the harbour master's order, the act of the shipowner was in the circumstances reasonable in removing the vessel and that the vessel was therefore removed by reason of a cause beyond the shipowner's control, namely, the threat of these tides. I think that I can do so, since the harbour master was in the best position to judge. I am satisfied that, if the case were to go back to the umpire, he would inevitably find that the shipowners were acting reasonably in withdrawing the vessel in accordance with the harbour master's views.

On the other point, Mr. MacCrindle points out that there is no finding about the state of the law in the Port of Calcutta: there is merely a finding that the master of the *Maria G* was obliged to conform to the orders of the harbour master. But, here again, I am prepared to put what I hope is a reasonable interpretation upon the words of that finding, this time in favour of Mr. Eckersley. I think that it means more than that the harbour master gave orders which he could only enforce by whatever physical means there might be at his disposal. I think it is implicit in this finding that the law in the Port of Calcutta was such as to authorize the harbour master to give orders of this character and that failure to comply with the order would have been a breach of the law. From this construction of the case I now approach the two matters of law.

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[6] [1925] 2 K.B. 172.

Mr. MacCrindle submits in the first place, that, leaving aside the intervention of the harbour master, if the vessel was removed from the berth because it was reasonably necessary for her safety that she should be removed, even if that was the voluntary act of the shipowner, it was not the fault of the shipowner and consequently it does not prevent the lay time from continuing to run. For that proposition he has relied upon a decision of Channell J. in *Houlder* v. *Weir*.[7] The headnote reads as follows: "Where the taking in of ballast during "the process of discharge of cargo is necessary for the safety of "the ship and of the cargo remaining on board, the fact that the "taking in of the ballast delays the discharge of the cargo does "not relieve the charterer from his obligation to complete the "discharge within the stipulated time." Channell J. dealt with that point[8]: "The remaining question is whether the days on "which the vessel was taking in ballast as well as discharging "cargo should be reckoned as whole days or not. I think they "ought. When Lord Esher[9] . . . said that 'if the shipowner "'by any act of his has prevented the discharge, then, though "'the freighter's contract is broken, he is excused,' he was "referring to a case in which the shipowner's act preventing the "discharge was in breach of his obligation to give the charterer "all facilities for the discharge. But here the act of the ship-"owner which delayed the discharge was not a breach of any "obligation of his. The taking in of ballast in the course of the "discharge was a thing necessary to be done. When part of the "cargo has been discharged something must be done to keep

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[7] [1905] 2 K.B. 267; 21 T.L.R. 503.

[8] [1905] 2 K.B. 267, 271.

[9] In *Budgett & Co.* v. *Binnington & Co.* [1891] 1 Q.B. 35, 38.

"the ship upright for the safety of the remainder of the cargo as "well as of the ship itself. Under those circumstances the case "stands on the same footing as that of the discharge of the cargo "being prevented by some act beyond the control of the ship-"owner, and consequently, though the charterers have been "prevented from having the full benefit of those days, they must "be treated as whole days."

The principle that Channell J. is there laying down is not, in my judgment, confined, as Mr. Eckersley would have me confine it, to cases where what is being done by the shipowner is necessary for the safety of the cargo as well as of the ship. Of course, the safety of the cargo is threatened by any threat to the safety of the ship and that is as much true in this case in relation to the cargo that was on board before she was moved as in the case which Channell J. was considering. But, in my judgment, the principle which Channell J. was laying down is quite independent of that: he is saying that the mere fact that the shipowner had by some act of his prevented the discharge is not enough to interrupt the running of the lay days; it is necessary for the charterers to show also that there was some fault on the part of the shipowner and, if the act of removal by the shipowner or the intervention with the lay days is caused by something that is beyond his control and not his fault, then the lay time is not interrupted. In my judgment, therefore, Mr. MacCrindle is right in his submission that, assuming the act of the shipowner to be a voluntary act, it did not interrupt the running of the lay time.

The other point is whether, having regard to the fact that the ship was moved by the order of the harbour master, it can be said that the loading was prevented by illegality, that is to say, the loading was prevented by the fact that to continue loading would have been a breach of the law of the port of loading, and whether, if that is established, it excuses the charterer. It has not, I think, yet been decided whether or not illegality at the port of loading would relieve the charterers—would prevent the lay time from running. The case that is nearest on the point is the case to which I have already referred, *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*.[10] The decision in that case was that the cause of the ship leaving port which prevented her from loading did not amount to an illegality within the principle of *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*.[11] The headnote reads: "A charterparty of an Italian

[10] [1925] 2 K.B. 172.

[11] [1920] 2 K.B. 287; 36 T.L.R. 456.

"ship provided that 216 running hours (Sundays and holidays "excepted), weather permitting, should be allowed the charterers "for loading and discharging, and that the lay days should commence from the time the steamer was ready to receive or "discharge her cargo, the captain giving six hours' notice to the "charterers' agents, berth or no berth. The exceptions clause "excepted 'restraint of princes, rulers and people.' The ship "arrived at Batoum, and notice of readiness to load was given, "and the lay days began to run. Owing, however, to a dispute "between the Russian and Italian Governments, the ship was "ordered by the port authorities to leave Batoum and also "Russian waters, and accordingly the ship went to Constantinople. "Subsequently permission was obtained to load the ship at "Batoum, and she returned after being absent from the port a "little over a fortnight. The owners subsequently claimed "demurrage from the charterers, on the basis that the lay days "continued to run during the period the ship was absent from "Batoum: *Held*, by the Court of Appeal . . . (1) That the lay "days continued to run notwithstanding that the ship was "compelled to leave the port by order of the port authorities."

If the order of the harbour master in the present case had been a purely executive act, I think that Mr. MacCrindle could have relied upon *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [12] as covering it. But I think that Mr. Eckersley is right in his submission that the decision in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [12] turns on the finding or on the view of the Court of Appeal that the orders that were there given to the ship were purely executive orders and had nothing to do with the state of law at the port of Batoum and that it was on that ground that the decision in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [13] was distinguished. The orders that were given by the port authorities were given in response to a command by the Russian Government and they were, I think, really an act of the sovereign authority of the Government and depended for their virtue upon the sovereign authority of the Government within the ports of its own country and not upon any particular provision of the law in force at Batoum. I think that that is a fair ground of distinction, and consequently the question of illegality, which depends on the law in force at the place of loading, did not arise and was indeed expressly reserved by Atkin L.J.[14] I shall not decide it because I think that Mr. MacCrindle can succeed on a simpler ground.

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[12] [1925] 2 K.B. 172.

[13] [1920] 2 K.B. 287.

Assuming that the law made it an offence for the charterers to attempt to load during the six days in which the vessel was removed from the berth, Mr. MacCrindle argues that that was not the cause of the charterers' failure to load within the lay days. What he submits is, that, put at its highest, if illegality is an excuse at all it must operate on the loading. The law that is relied upon must be a law that prevents the loading of the vessel—the act of loading. It is not enough to point to a law which makes it an offence to load the vessel during a particular part of the lay days, however large a part they may be, and to say that that prevents the loading of the vessel. What is prevented is not the loading of the vessel, but the loading of the vessel within a particular time that is prescribed by the charterparty. That point was considered by Sellers J. in *Steamship "Induna" Co. Ltd.* v. *British Phosphate Commissioners*,[15] in which the law in force at the port of discharge made it illegal to work at night time between 9 p.m. and 8 a.m. The consequence of that was that it became impossible for the ship to discharge at the prescribed rate and, therefore, to complete the discharging within the lay days. Sellers J. dealt shortly with that point and said[16]: "The case of *Ralli Brothers* v. *Compañia Naviera Sota "y Aznar*[17] was quoted to support an argument that the illegality "of night discharging could be relied on. In my opinion that "case has no application. The contract provided for discharge "at the rate of 1,500 tons per working day of twenty-four hours, "and it was not illegal to discharge at that rate if it could have "been done." I respectfully follow and adopt that statement of law and I am unable to distinguish the position here from the position in Sellers J.'s case in any of the ways in which Mr. Eckersley has invited me to do so. In that case a period was, as it were, taken out of the lay days because every night was removed. It was not a continuous period as it is here, where six days continuously were removed. But the principle appears to me to be the same and the point is, I think, entirely covered by what Sellers J. said.

The result is that the charterers have failed to discharge the ship within the lay days and have failed to show any ground

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[14] [1925] 2 K.B. 172, 210.

[15] [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522.

[16] [1949] 2 K.B. 430, 438.

[17] [1920] 2 K.B. 287.

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which excuses them from the performance of their contract. Therefore I answer the question of law stated in the case in the affirmative and, consequently, I uphold the award.

Award affirmed.

Solicitors: *Holman, Fenwick & Willan; Sinclair, Roche & Temperley.*

C. A.

1958
Feb. 10, 11, 12, 28.

Lord Evershed M.R., Parker and Sellers L.JJ.

PENN AND ANOTHER v. GATENEX CO. LTD.

[Plaint No. N. 2188.]

Landlord and Tenant—Covenant—Central refrigeration installation—Block of flats—Provision of motive power—Refrigerator sole provision for food storage—Liability of landlord—Terms of tenancy agreement—Tenant to have "use of fixtures and fittings" of landlord—Covenant for quiet enjoyment.

The landlords of a block of flats let one of the flats unfurnished under a tenancy agreement which contained no express reference to the provision of services by the landlords. The flat contained a refrigerator which was worked by a central installation under the landlords' control. The refrigerator was the only receptacle for food storage in the flat. By the tenancy agreement the use of the fixtures and fittings belonging to the landlords was granted to the tenant, but no specific reference was made to the refrigerator; the agreement also contained the usual covenant by the landlords for quiet enjoyment. In an action by the tenants of the flat for damages for breach of covenant in failing to keep the refrigerator in proper working order:—

Held (Sellers L.J. dissenting), that no obligation to supply the motive power to the refrigerator was expressed in or could be implied from the terms of the agreement, and, accordingly, the tenants had no cause of action against the landlords.

Rex v. *Paddington and St. Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd.* [1947] K.B. 984; 63 T.L.R. 303; [1947] 2 All E.R. 15 (affirmed on a different point [1948] 2 K.B. 413; 64 T.L.R. 388; [1948] 2 All E.R. 528) and *Rex* v. *Croydon and District Rent Tribunal, ex parte Langford Property Co. Ltd.* [1948] 1 K.B. 60 applied.

Per Sellers L.J. Without the refrigerator the flat was incomplete for ordinary domestic living having no other provision for storing food. The landlord had contracted to give the use of the refrigerator to the tenant and he was under the obligation so to maintain it as not to deprive the tenant of that use.

C. A.

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PENN
v.
GATENEX
CO. LTD.

APPEAL from Judge Leon, sitting at Willesden County Court.

By a tenancy agreement dated July 3, 1942, and made between the predecessors in title of the defendant company, Gatenex Co. Ltd., of the first part, the plaintiffs, P. Penn and R. E. Penn, of the second part and a guarantor, an unfurnished flat known as No. 255B, Minehead Court, South Harrow, Middlesex, was let for one year from June 15, 1942, at a yearly rent of £67 12s. with provision for additional rent for electricity and to cover any increases in the general and water rates which might be made from time to time. The letting included "the use of the "fixtures and fittings [in the demised premises] belonging to the "landlord," and the tenant covenanted, inter alia, by clause 2 (iii) to maintain repair and keep the demised premises and all "locks bolts glass taps gas and electric fittings "of and in the demised premises belonging to the landlord "clean and in good and sufficient repair," subject to exceptions for fair wear and tear and damage by fire, and so to deliver them up at the determination of the term. The tenant further covenanted not to alter the demised premises or to remove, cut or injure "partitions doors cupboards "or other fixtures therein." The agreement contained in clause 3 (*a*) a covenant by the landlord for quiet enjoyment in common form which so far as material read: "shall peaceably hold and "enjoy the demised premises . . . without any interruption by "the landlord." The flat, which was one of 24 owned by the same landlords, contained a refrigerator designed to be operated from a central installation supplying all the flats and under the sole control of the landlords. This was the only specific provision for food storage in the flat. There was no larder. When the tenants entered into occupation and for some time thereafter the refrigerator worked intermittently. Early in October, 1956, the defendants acquired the freehold and thereupon the refrigerator stopped working. At some date not stated the contract of tenancy was determined by service of a notice to quit on the tenants and they thereafter continued in occupation of the flat as statutory tenants on the terms, so far as appropriate, of the original tenancy agreement.

The tenants brought proceedings against the landlords claiming, inter alia, that by the express or implied terms of the tenancy agreement they were entitled to be supplied with refrigeration by the landlords and that the landlords were liable to maintain and keep the central plant in proper working order. In the alternative they claimed that such terms were to be implied from the nature and circumstances of the agreement. The county court judge gave judgment in their favour and the landlords appealed.

Heathcote-Williams Q.C. and *Bernard Finlay* for the landlords. The issue is whether a term obliging the landlords to supply motive power to the refrigerators ought to be implied in the tenancy agreement; it is not now contended that the refrigerator was not one of the fixtures and fittings. The ground on which the judge sought to distinguish *Rex* v. *Croydon and District Rent Tribunal, ex parte Langford Property Co. Ltd.*[1] was that in that case the tenant had not been specifically granted the use of the fixtures and fittings. That ground of distinction was not available in *Rex* v. *Paddington and St. Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd.*,[2] to which his attention had not been drawn. That ground of distinction, however, was too narrow and both cases are in point. They are not, of course, binding on this court, but they have stood for many years and have never been questioned, and further, it must be taken that Parliament had them in mind in passing section 40 of the Housing Repairs and Rents Act, 1954, and section 4 of the Rent Act, 1957, which give to a tenant a remedy in such circumstances against his landlord: see *Asher* v. *Seaford Court Estates Ltd.*[3] It is plain from the *Croydon* and *Paddington* cases that the court will not imply a term imposing an obligation unless the inference is irresistible and necessary to the operation of the agreement, and further, the scope of the obligation can be defined with precision. [Reference was made to *Luxor* (*Eastbourne*) *Ltd.* v. *Cooper.*[4]] It is not sufficient to show that the term suggested would be reasonable (*Hamlyn & Co.* v. *Wood & Co.*[5]); nor is a common expectation that a landlord would do something a sound basis for implication of that something: *Adams* v. *Adams.*[6] The exact extent of the implied term must be plain and have been in the intention of both parties: *The Moorcock.*[7] None of these requirements is satisfied in the present case. So far as intention is concerned, it is by no means clear what the tenants could have expected the landlords would do—whether the supply of motive power would be continuous throughout the day and night for the whole year or whether something less was to be expected—but whatever they may have thought, it seems most unlikely that the landlords would ever have contemplated more than that the supply should continue for as long as the plant would work. Having regard to the low rent it is hardly likely that they would have contemplated installing a new plant.

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[1] [1948] 1 K.B. 60.

[2] [1947] K.B. 984; 63 T.L.R. 303; [1947] 2 All E.R. 15.

[3] [1950] A.C. 508; 66 T.L.R. (Pt. 1) 943; [1950] 1 All E.R. 1018.

[4] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.

[5] [1891] 2 Q.B. 488; 7 T.L.R. 731.

[6] [1941] 1 K.B. 536; 57 T.L.R. 329; [1941] 1 All E.R. 334.

[7] (1889) 5 T.L.R. 316.

No representation was made by the landlords as to the refrigerator, and it was not even mentioned in the lease. The case might perhaps have been different if the lease had specifically granted to the tenants "the use of the refrigerator." There is no evidence that the refrigerators were held out as an attraction to intending tenants. No doubt if they had been, and the landlords had not then made it clear that they were under no obligation to supply motive power, there would have been ground for criticism; but it seems that even in those circumstances the court would not necessarily have found that the landlords were under any implied obligation.

The tenants have sought to rely on the covenant for quiet enjoyment, but that cannot be used to extend the grant. The tenants only enjoy what they get. A wider covenant than this was considered in *Leech* v. *Schweder*.[8] A distinction should be drawn between a tenancy which creates an estate in land, which cannot normally be frustrated, and an ordinary commercial contract which can. [Reference was made to *Paradine* v. *Jane*[9] and *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*[10]]

The landlords did not deliberately stop the plant. It stopped because it was worn out. A breach of the covenant of quiet enjoyment usually involves some act of commission. If a flat contains, for example, a bath with a hot and a cold tap, the landlord is not under an implied obligation to provide hot water in the bath, even if there is a central hot water system: *Rex* v. *Hampstead and St. Pancras Furnished Houses Rent Tribunal, ex parte Ascot Lodge Ltd.*[11]

[SELLERS L.J. The tenants have been granted the use of the refrigerator. Unless motive power is available, this is not a refrigerator, but merely a box. A bath is not analogous.]

The radiators in the *Croydon* case[12] are perhaps a better example, for they were quite useless unless hot water was available. It is most difficult to see what could have been the scope of an implied covenant in this case. It would be revolutionary to hold that it involved the landlords in liability to do repairs to fixtures, the use of which had been granted to the tenants, although by the terms expressed in the agreement the landlords were not under any liability to do repairs to them. The same construction must be put on the scope of the landlords' obligations for all the fixtures and fittings, and it would seem, therefore, that if they were under any obligation with regard to the refrigerator, they might also, for example, have to put in a new bath if the old one wore out.

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[8] (1874) L.R. 9 Ch. 463.

[9] (1647) Aleyn 26.

[10] [1945] A.C. 221, 229; 61 T.L.R. 202; [1945] 1 All E.R. 252.

[11] [1947] K.B. 973; 63 T.L.R. 301; [1947] 2 All E.R. 12.

[12] [1948] 1 K.B. 60.

[SELLERS L.J. If the landlords have contracted to let a refrigerator, they must let that and nothing else. But if the refrigerator stops working because of some defect within the control of the tenants, for example, if the handle comes off, then that would be the tenants' responsibility. The *Ascot Lodge* case [13] turned on jurisdiction and there was no room there on the facts for any implication. It is no authority for saying that the courts cannot imply an obligation to supply hot water. The covenant to supply services was struck out before completion.]

[LORD EVERSHED M.R. In *Regis Property Co. Ltd.* v. *Dudley* [14] there was a distinction between the boilers, etc., under the control of the landlords and the baths and taps which were under the control of the tenant.]

The tenants could have put in their own refrigerator; the failure of the central system did not make the flat incomplete. It may, of course, have been reasonably supposed that the landlords would supply refrigeration, but that may have been done as a concession. It is impossible to spell out of this long and detailed agreement any obligation to provide it.

G. D. Lovegrove for the tenants. In deciding whether a covenant to supply motive power should be implied, regard should be had to the contract of letting, the type of premises and the circumstances of the case. Decided cases are not of real assistance. [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 8, p. 121.] This refrigerator could not be used as such unless the landlords supplied motive power from the central plant. The tenants could do nothing to ensure a supply. If the refrigerator was not working, it was useless. It could not be used for food storage because it was hermetically sealed; and there was no other provision made for the storage of food in the flat. The flat was to be used only as a private dwelling-house, and unless some provision was made for food storage it was incomplete for the ordinary purposes of domestic living. By the contract of letting the tenants were expressly granted the use of the fixtures and fittings, and if the refrigerator does not work they are being deprived of the use of one of them. It is significant that the refrigerator stopped working when these landlords, the present defendants, took over. The onus is on them to show that that was not due to their deliberate act. But the tenants do not have to put their case so high. It is sufficient if they show that the landlords have omitted to do something which they should have done: *Booth* v. *Thomas* [15]; Foa, Law of Landlord and Tenant, 8th ed. (1957), p. 301, and *Anderson* v. *Oppenheimer*.[16] The landlords were under a duty to maintain the plant. They omitted to perform that duty and the damage flowed.

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[13] [1947] K.B. 973.

[14] [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510.

[LORD EVERSHED M.R. The difficulty is to extract the precise extent of the duty. In *Booth* v. *Thomas* [17] the standard of duty did not have to be spelled out of the lease.]

It is a question of fact in each case whether the landlord has failed to comply with the standard of care arising out of the terms of the contract and the structure of the premises. Common law standards of negligence are not necessarily the same.

[LORD EVERSHED M.R. In *Anderson* v. *Oppenheimer* [18] Brett and Cotton L.JJ. would not have used negligence in anything other than the common law sense.]

[PARKER L.J. See also *Cohen* v. *Tannar*.[19] The breach may be by an act of omission, but there must be a breach of duty. [Reference was made to *Rylands* v. *Fletcher*.[20]]]

It is not suggested that this is a *Rylands* v. *Fletcher* [20] type of case. There are two quite separate duties: one under the covenant and one at common law.

There was an implied duty not to deprive the tenant of the use of any room. This refrigerator, being the substitute for the larder, was in substance a room. A distinction should be drawn between something which is essential, such as a lavatory or this refrigerator, and something such as central heating or hot water in the bathroom, which is merely desirable: see *Anderson* v. *Oppenheimer*,[21] where Thesiger L.J. expressed the opinion [22] that if the water supply to the cistern was cut off the tenant would have been entitled to complain. There was no question of common law nuisance in *Davis* v. *Town Properties Investment Corporation Ltd.*[23] It is not extending the covenant for quiet enjoyment to say that it covers the fixtures and fittings, the use of which has been granted to the tenants. The obligation which should be implied in this case is to supply motive power all the time, apart from short periods when it may be necessary to shut down for servicing and so forth. The temperature which should be kept is no more difficult to decide than it is in cases where a landlord is under covenant to provide " hot " water.

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[15] [1926] Ch. 397; 42 T.L.R. 296.

[16] (1880) 5 Q.B.D. 602.

[17] [1926] Ch. 397.

[18] 5 Q.B.D. 602.

[19] [1900] 2 Q.B. 609.

[20] (1868) L.R. 3 H.L. 330.

[21] 5 Q.B.D. 602.

[22] Ibid. 609.

[SELLERS L.J. The obligation should be to the extent necessary to provide the tenant with the equivalent of a larder.]

Allied to the covenant for quiet enjoyment is the principle that the landlord must not derogate from his grant. [Reference was made to Foa, 8th ed., p. 72, and to *Birmingham, Dudley and District Banking Co.* v. *Ross.*[24]] The grant of a house prima facie includes that which is necessary for the enjoyment of it. The landlord cannot, as Cotton L.J. said,[25] interfere with that which he has granted—the house and the enjoyment of it.

[LORD EVERSHED M.R. Would the " use of the bath," where hot and cold taps are fitted, imply that the landlord undertook to supply hot water?]

Hot water is not essential to the use of a bath. It could be used with cold water, or the water could be boiled in a kettle. Regard must be had to the particular appliance in deciding what should be implied. This refrigerator is useless unless motive power is available.

In *Aldin* v. *Latimer Clark, Muirhead & Co.*[26] it was decided that the grantor of land for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which it was granted: see *per* Stirling J.[27]

The *Croydon* case[28] is distinguishable: first on the wording of the agreement, which in that case did not give the tenant the " use of " the bath; second, the subject-matter was not as essential in that case—the premises could be used without the bath and the bath could be used without the hot water; third, it was more difficult to be precise in that case as to what could be reasonably implied—whether the landlord could reasonably be said, for example, to be under an obligation to supply hot water all the time, or, if not, for what periods. Finally, it is significant that in this case, unlike the *Croydon* case,[28] the agreement was signed during the war when there was no difficulty in getting flats in the London area and landlords were anxious to let them. If it should be held, however, that the *Croydon* case[28] cannot be distinguished, it is submitted that it was wrongly decided and should be overruled.

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[23] [1903] 1 Ch. 797.

[24] (1887) 38 Ch.D. 295; 4 T.L.R. 437.

[25] 38 Ch.D. 295, 308.

[26] [1894] 2 Ch. 437; 10 T.L.R. 452.

[27] [1894] 2 Ch. 437, 447.

[28] [1948] 1 K.B. 60.

Heathcote-Williams Q.C. in reply. The difference between what the tenants have submitted should be the scope of the alleged obligation of the landlords and what the county court judge considered would be proper underlines how difficult it would be to hold that the scope could be defined precisely. The judge said that he considered that he ought to take into account the fact that the plant had been steadily decreasing in efficiency from the time when the tenants went into possession. On the facts it is not correct to say that the refrigerator was entirely useless if motive power was unavailable; it could be used for storing tinned food; nor was this the only accommodation in the flat for storing food. The tenants could have used a small cupboard over the refrigerator. But even if the tenants had shown that no accommodation for food storage was provided and that a larder was essential to the habitation of these premises as a flat, it would not follow that the landlords would be under any obligation to provide one. It would be quite revolutionary to hold that at common law if a tenant takes a house lacking some essential part, such as a water closet, that the landlord is under an obligation to provide one. In the case of the demise of a house it is implicit that the tenant has the use of the house as it is. For example, "use of" in a demise of premises containing hot water pipes would mean that the tenant was to have the use of the pipes, but they might be quite useless for the provision of hot water. There is no obligation on a landlord, apart from express covenant or statute, to keep premises in repair. Even in the case of furnished premises the only warranty is that the premises are fit for habitation at the commencement of the letting: *Sarson* v. *Roberts*.[29]

Normally a breach of a covenant for quiet enjoyment involves doing something positive. A mere omission would have to amount to or be liable to amount to a wrongful act in itself: *Booth* v. *Thomas*.[30] There can only be a breach if the landlord has omitted to perform some positive duty, and that duty cannot be found in the covenant itself. In *Anderson* v. *Oppenheimer*[31] the issue was whether the duty was proved. [Reference was also made to *Davis* v. *Town Properties Investment Corporation Ltd*.[32]] It is inapt to speak of a derogation from the grant; there has been no grant of the use of the refrigeration plant. The issue is whether there is an implied term, not as to what is included in the parcels.

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[28] [1948] 1 K.B. 60.

[29] [1895] 2 Q.B. 395; 11 T.L.R. 515.

Cur. adv. vult.

February 28. LORD EVERSHED M.R. stated the facts and continued: It is plain that the judge greatly sympathized with the tenants, and in this respect I entirely share his view. The refrigerator is a bulky object which fully occupies the space that would otherwise be employed as a larder. It was said with great force by Mr. Lovegrove that in its present condition the flat lacks the ordinary means which every housewife requires for keeping perishable food. True, the tenancy agreement was made in the most critical period of the late war when, as we all know, it was difficult to obtain supplies of many kinds of goods and labour and then the apparatus for supplying power to the refrigerator was already deficient. Still, the then landlords forbore from inserting in the document which they put forward any reservation clearly protecting them from the alleged liability. On the contrary, they put forward a document which required the joinder of a guarantor for the tenants' obligations and of which the second clause contained no less than 18 separate covenants on the part of the tenants comprehending such matters as the keeping of rabbits and reptiles, the mowing of lawns and the weeding of gardens, which may have owed their presence more to precedents than the requirements of the actual contract being made. But these criticisms and the sympathy which I feel for the tenants cannot be invoked in order to enable the court to discern the covenant alleged if the covenant is not there expressly or by necessary implication.

The essential provisions of the contract are found in the habendum, with such assistance as can be got from the landlords' covenant for quiet enjoyment in clause 3. The habendum, so far as relevant, is as follows: "All that flat situate and known as

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[30] [1926] Ch. 397.

[31] 5 Q.B.D. 602.

[32] [1903] 1 Ch. 797.

"255b, Minehead Court . . . with the use of the fixtures and "fittings therein belonging to the landlord." The material terms of the covenant for quiet enjoyment, which is in common form, include (clause 3 (*a*)): " . . . shall peaceably hold and enjoy the "demised premises . . . without any interruption by the "landlord . . ."

Although the tenants' case is pleaded alternatively on the basis of express or implied obligation, in truth the problem is in my judgment one and the same. Nor, in my view, can Mr. Lovegrove improve his position by invocation of the principle that a landlord cannot derogate from the grant; for it is well established that the principle cannot serve to enlarge the grant. The question then is: according to the terms of the contract, and particularly clauses 1 and 3 (*a*), did the landlords expressly or by necessary implication promise to provide the motive power which alone would render the refrigerator capable of use as such, and to do all such other things by way of repairs as would be incidentally necessary? I can conveniently dispose here of one point. Mr. Heathcote-Williams contended that the refrigerator, even if incapable of use for the purposes for which it had been made, could still serve for the tenants the purpose of containing such things as tinned food and boots or other objects which called for no treatment by way of refrigeration. In my judgment, there is no substance in this argument. Beyond doubt the use of the refrigerator, in so far as it was contemplated by the parties to the contract, must have been its use for refrigeration.

Mr. Lovegrove put his case very simply (and therefore, as is so often true, most effectively) thus: It is not in doubt that the refrigerator was and is one of the fixtures and fittings belonging to the landlord, the use of which was included in the grant: if, therefore, the landlord promised that the tenants should have the use of the refrigerator, how is that promise fulfilled, if in fact the refrigerator cannot be used at all?

In support of this formulation of his case, Mr. Lovegrove referred to such authorities as *Birmingham, Dudley and District Banking Co.* v. *Ross* [1] (in the Court of Appeal) as supporting the proposition that [2] "when a man grants a house, he grants that "which is necessary for the existence of that house"; and [3] "prima facie he cannot interfere with that which he has granted; "there is an implied obligation on him not to interfere with that "which he has granted; namely, the house, and enjoyment of the

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[1] (1887) 38 Ch.D. 295; 4 T.L.R. 437.

[2] 38 Ch.D. 295, 306.

[3] Ibid. 308.

"house" (see *per* Cotton L.J.). Mr. Lovegrove referred also to the judgment of Stirling J. in *Aldin* v. *Latimer Clark, Muirhead & Co.*,[4] where the judge referred[5] to "the principle . . . "that the grantor of land to be used for a particular purpose is "under an obligation to abstain from doing anything on the "adjoining property belonging to him which would prevent the "land granted from being used for the purpose for which the "grant was made." Assuming, however, that Mr. Lovegrove can get in the present case so far as to make such principles applicable, he would still be faced with the difficulty that the landlords here have not in fact done anything. They have not, according to the evidence, deliberately disconnected the refrigerator from its motive power. They have merely refrained from taking steps to prevent the mechanism, already deficient, from becoming altogether inoperative. Their sins, if sins they be, are therefore sins of omission only. It is true that omissions may amount to breaches of the ordinary covenant for quiet enjoyment: but it seems that such omissions should be of a character as would amount, or be liable to amount, in themselves to wrongful acts. See *Booth* v. *Thomas*[6] (*per* Russell J. and in this court[7]): where a landlord's omission consisted of failure to repair an artificial watercourse so that the results would have been liable to constitute wrong to a neighbouring landowner.

But in my judgment Mr. Lovegrove cannot in the present case surmount the first hurdle which confronts him. If the habendum here contained express reference to the use of the refrigerator, he would to my mind be in a far stronger position, and Mr. Heathcote-Williams so conceded. The case would then be fairly analogous to the example put in the course of the argument of the grant of a tenancy of a flat at the top of a building, together with the right to use the lift which remained in the landlord's control and was the ordinary means of access to the flat. But there is no reference in terms to the refrigerator in the contract before us. To that extent it seems to me that Mr. Lovegrove cannot assert any express obligation. He must rely upon the necessary inferences to be extracted from the general words "fixtures and fittings." Undoubtedly the refrigerator was one of the fixtures and fittings: but the general phrase would include many other things such as cupboards, and bathroom and lavatory fittings. What, if Mr. Lovegrove is right,

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[4] [1894] 2 Ch. 437; 10 T.L.R. 452.

[5] [1894] 2 Ch. 437, 447.

[6] [1926] Ch. 397; 42 T.L.R. 296.

[7] [1926] Ch. 397.

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is the extent of the landlords' obligation, quoad these last-mentioned things, implicit in the grant plus the covenant for quiet enjoyment? Are they bound to supply water for the bath—more particularly, hot water for the hot tap? And do the obligations extend for the 24 hours of day and night throughout the tenancy?—an aspect of the matter on which the judge obviously felt a difficulty. It is true that it cannot be said of the bath that it would be wholly incapable of use as such in the absence of a central supply of hot water; whereas the refrigerator is wholly useless as a refrigerator in the absence of the motive force which the landlords alone control. But I have felt compelled to the conclusion that so much significance cannot be extracted fairly, and still less necessarily, from the general terms of the habendum aided by the covenant for quiet enjoyment; and I observe for what it is worth (though I do not attach much significance to it) that the tenants appear not to be under any obligation to keep the refrigerator in repair (see clause 2 (iii)).

Somewhat similar contentions were considered by the Divisional Court in the years 1947 and 1948 in cases affecting the Furnished Houses (Rent Control) Tribunals. The first was that of *Rex* v. *Paddington and St. Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd.*[8] In that case the terms of the grant included the words: "Together with the right to use the water "closets lavatory accommodation and bathrooms situate in the "building." It was held that no covenant could be implied to supply hot water to the bathrooms. Similarly in the second case, *Rex* v. *Croydon and District Rent Tribunal, ex parte Langford Property Co. Ltd.*[9] the Divisional Court held (though Macnaghten J. vigorously dissented from his brethren) that no covenant to supply hot water for the central heating radiators could be implied, though such radiators would plainly be quite useless without such supply and the tenant could not remedy the matter for himself. In the *Croydon* case [9] there appears to have been no grant of the use of the radiators, though the landlord had not failed to advertise the central hot water supply as an attraction. The county court judge therefore distinguished the present case in reliance upon the express language "with the "use of the fixtures and fittings" etc. But, in my judgment, the *Paddington* [10] and *Croydon* [11] cases cannot be distinguished on so narrow a ground. The basis of the decisions is well illustrated by Lynskey J.'s citation in the *Croydon* case [12] from the earlier judgment:—" There is no ground in my opinion for implying any covenant and none ought ever to be implied unless the implication is so necessary that the court can have no doubt what covenant or undertaking to write into the agreement." True, these cases are not binding upon this court. But they have, I do not doubt, been frequently acted upon since they were decided in many of the numerous cases to which rent control has given rise. I think, therefore, that the court should be very slow to disturb them. It would no doubt be possible, by basing the result on the particular words of the particular contract here in question, to distinguish this case from the Divisional Court cases. But, again, I think this court should be slow to introduce fine distinctions into the law. Moreover, I do not think that on principle such distinctions could be supported.

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[8] [1947] K.B. 984; 63 T.L.R. 303; [1947] 2 All E.R. 15 (affirmed on a different point [1948] 2 K.B. 413; 64 T.L.R. 388; [1948] 2 All E.R. 528).

[9] [1948] 1 K.B. 60.

[10] [1947] K.B. 984.

[11] [1948] 1 K.B. 60.

In the result, I have come to the conclusion that the tenants' cause of action cannot be sustained. The result is no doubt a hard one for the tenants, and I reach with some regret a conclusion which may be said in modern conditions to reflect a blemish in the law of landlord and tenant. But sympathy for the tenants is, I fear, no safe guide to legal conclusions, particularly for conclusions in the long-established law relating to landlord and tenant.

I would, therefore, allow the appeal.

PARKER L.J. I have come to the same conclusion.

It is, I think, important to bear in mind the exact facts of this case. When the tenants entered into occupation the refrigerator was not in proper working order. It was only working intermittently, though it was of some use. From about October, 1956, it ceased to work entirely. Why this occurred is not as clear as it might be, since the landlords called no evidence, but from the evidence of Mr. White, an engineer called on behalf of the tenants, it seems to me that the only proper inference is that the plant was old, and that long before 1956 its condition was such that Mr. White's company had refused to undertake a maintenance contract. In his view it would cost £500 to put the plant in order, always assuming that spare parts were obtainable. It is not, therefore, a case of the defendants having deliberately cut

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[12] [1948] 1 K.B. 65.

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off the refrigeration. Indeed, as I understand it, no suggestion of that kind was made at the trial.

The question, in these circumstances, is whether the county court judge was right in holding that it was a term of the tenancy agreement that "the landlord would keep the refrigerator in "reasonable working order." So far as demised premises themselves are concerned, I take it to be the law that, in the absence of express covenant, a landlord is under no obligation to keep the premises in repair. No such covenant will be implied. Nor in the case of unfurnished premises is there any implied warranty that the premises will be fit for habitation. It is true that in the case of furnished premises such a warranty will be implied as at the commencement of the letting, but it does not extend to the period of the letting. Apart, therefore, from the words "with "the use of the fixtures and fittings therein belonging to the "landlord" the position is, I think, plain. The refrigerator, being clearly a fixture, would have passed in the demise to the tenants, and there would have been no warranty that it was then in reasonable working order, much less a warranty or implied term that the landlord would keep it in reasonable working order throughout the letting. Do the words quoted have a contrary effect? I think not. Apart from these words the tenant would have had the right to use the refrigerator, it being, as I have said, a fixture included in the demise.

The matter does not, however, end there, since the "defect" complained of is not in the refrigerator as a fixture but in the plant supplying the refrigeration which is situated outside the demised premises. If, in these circumstances, there had been a specific grant of the use of the refrigerator the position might well be different, but here the only specific grant is of the use of the refrigerator as a fixture and, therefore, any obligation to supply refrigeration must be based on an implied term. Once that position is reached, I find it quite impossible to imply a term which could be said to be necessary or inevitable in the minds of both parties had they considered the matter. In the first place, it would have to be a term applicable to all the "fixtures and "fittings." Secondly, what are its precise terms in regard to the extent of the refrigeration and as to the contingencies, if any, which will excuse the landlord, bearing in mind, inter alia, that at the time of the demise the war was at its height?

A somewhat similar question came before the Divisional Court in *Rex* v. *Croydon and District Rent Tribunal, ex parte Langford*

Property Co. Ltd.[13] A furnished house rent tribunal had claimed to exercise jurisdiction on the basis that under the contract of letting in question the landlords were obliged to render services, in that case the supply of hot water and central heating. The contract provided for the letting of the premises "together with "all fixtures, privileges, rights, easements and appurtenances to "the said premises." The fixtures and appurtenances included a hot water system for the supply of hot water to the kitchen taps, the bath and the heating radiators. The hot water system was controlled by the landlords. It was argued that it was a necessary implication that the landlords should supply the heating and the hot water, but the court (Lord Goddard C.J. and Lynskey J., Macnaghten J. dissenting) refused to accept that argument. Lynskey J., giving the judgment of the majority of the court, said [14]: "A similar argument was advanced in *Rex* v. *Paddington* "*and St. Marylebone Rent Tribunal, ex parte Bedrock Invest-* "*ments Ltd.*[15] without success. We said in that case [16]: 'There "'is no ground in my opinion for implying any covenant and none "'ought ever to be implied unless the implication is so necessary "'that the court can have no doubt what covenant or undertaking "'to write into the agreement.' In these days of shortage of "essential commodities, landlords may well refuse to provide any "service, however willing to give it as a matter of grace or "concession. Where it is intended to impose upon a landlord an "obligation to give such services it is usually set out in express "terms in the agreement of tenancy with limitations as to hours "and periods during which such services are to be rendered. In "this case, such a term is missing from the agreement, and, in "our view, this was a deliberate omission. In our opinion, it is "unlikely that, in the circumstances, the landlords would have "been prepared to bind themselves contractually to give these "services. In this case we are satisfied that no such term as "suggested can or should be implied. It may well be that the "tenant expected and the landlords hoped that such services as "could reasonably be given for heating and the supply of hot "water would be given, but unless there was a contractual obliga- "tion to render such services on the part of the landlords, this "would not avail to make the rent one which includes payment "for services so as to confer jurisdiction on the rent tribunal."

Each case must, of course, depend on its own facts, and Mr. Lovegrove, for the tenants, sought to distinguish the present case.

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[13] [1948] 1 K.B. 60.
[14] Ibid. 65.
[15] [1947] K.B. 984.
[16] Ibid. 990.

He pointed out that in the *Croydon* case[17] the words "and the "use of the fixtures and fittings" did not appear, a fact which the county court judge also relied on. For my part, however, I do not think that the presence of those words affords any valid distinction. Whether it said so expressly or not the tenants in the *Croydon* case[17] clearly were granted the use of radiators, the bath and the taps. Indeed, in *Rex* v. *Paddington Rent Tribunal, ex parte Bedrock Investments Ltd.*,[18] the tenant was expressly granted the "right to use . . . lavatory accommodation and bath- "room." Mr. Lovegrove further contended that hot water was not, whereas refrigeration in the absence of a larder was, essential, but again I doubt whether this argument is sound. Whether the one is more "essential" than the other may be a matter of taste. Nor does it make any difference in my judgment that a supply of hot water is not needed every hour of the day and night, whereas a supply of refrigeration is.

Mr. Lovegrove, however, invited us to overrule the *Croydon* case.[19] For my part, I think that it was properly decided, but even if I felt any doubt I should hesitate a long time before overruling a decision which has stood unchallenged for 10 years, and upon which furnished rent tribunals throughout the country have acted. Moreover, no doubt as a result of that decision, Parliament has by section 40 of the Housing Repairs and Rents Act, 1954, provided a remedy for tenants in such circumstances.

Mr. Lovegrove also based his claim on the covenant for quiet enjoyment, and he has referred to *Booth* v. *Thomas*[20] in support of the proposition that there may be a breach of that covenant by acts of omission as well as acts of commission. Whilst accepting that proposition, I feel myself some difficulty in seeing how the tenants are in any better position by basing their claim on this covenant. Prima facie, the covenant for quiet enjoyment is an undertaking to indemnify the tenant against lawful acts. If an unlawful act is committed whether by the landlord or anyone else, the tenant has a right against the wrongdoer. No doubt, however, if the landlord is guilty of a wrongful act against the tenant, as in *Booth* v. *Thomas*,[20] by reason of his being an adjoining occupier, he also may be liable under the covenant for quiet enjoyment. But here there being no wrongful act, unless it be under the agreement, one is at once thrown back on the meaning of the words "with the use of the fixtures and fittings."

Finally, Mr. Lovegrove said that the landlords were derogating from their own grant. The validity of this contention, as it seems to me, stands or falls with the answer to the question whether there has been a breach of covenant. I do not think the principle assists.

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[17] [1948] 1 K.B. 60.
[18] [1947] K.B. 984.
[19] [1948] 1 K.B. 60.
[20] [1926] Ch. 397.

Accordingly, I feel constrained to allow the appeal.

SELLERS L.J. The agreement on which the tenants sue for damages for its breach provides that the landlord lets and the tenant takes "all that flat situate and known as 255b Minehead "Court with the use of the fixtures and fittings therein belonging "to the landlord." There was no inventory or statement of what the fixtures and fittings were, and the evidence does not refer to anything except a refrigerator. It would seem that there were electric light fittings, but in the absence of evidence I see no reason to infer that there were any radiators or other provision for central heating.

The tenants complain that since October 1, 1956, they have not had the use of the refrigerator as the tenancy agreement provided for them.

It appears that the tenants' flat is one of 24 flats, each of which was provided with a refrigerator, worked from a central plant solely in the control of the landlords as regards its situation and its operation. The "fitment" in the flat was not a refrigerator unless it was continuously supplied through the central plant with the means of refrigeration. The flat, which the tenants covenanted to use only as a private dwelling, had no larder and was not in any practical sense equipped for keeping the food which would ordinarily and normally be kept in any household. It would appear that the refrigerator provided in the tenants' flat was a substitute for a larder—it may be that this was so in respect of all the flats—and the inclusive rent for the flat to be used as a private dwelling included the use of the refrigerator.

If the refrigerator had been a self-contained unit—operated by electricity or gas which was supplied to the flat—and solely under the control of the tenants, then under this agreement the tenants could not complain against the landlords if the refrigerator was old, defective or unsatisfactory, or if in the course of time it became unusable. But they could at least have taken steps to keep it in running order.

The well-established law on which my Lords have relied may well apply in such circumstances. Where I differ from my Lords, with deference, is that I feel that the new and different circumstances revealed in this case permit and require a different construction of the contractual obligation of the landlords.

Fixtures let to a tenant are normally complete in themselves and are capable of being maintained by the tenant (frequently under the requirement of a covenant) in serviceable order and suitable for their purpose. It is unusual to have the necessary component parts of a fixture partly in control of the tenant and partly (and, in this case, in respect of a vital part) in the control of the landlord. Here an essential part of its functioning is in the hands of the landlords, who have contracted to give the use of the refrigerator to the tenants. This seems to me to be an express obligation. It is not specific as to the quality of refrigeration, which does not seem to have been very good at any time since the tenants acquired the tenancy, but if it ceased—as it did—to operate at all, the landlords seem to me to alter the character of the fixture and deprive it of its service for which the tenants were paying, in part, a rent.

If an agreement gives a tenant the use of something wholly in the occupation and control of the landlord, for example, a lift, it would, I think, be accepted that the landlord would be required to maintain the lift, especially if it were the only means of access to the demised premises. I recognize that a lift might vary in age and efficiency, but in order to give meaning to the words "the use of" and to fulfil them, it should at least be maintained so that it would take a tenant up and down, subject to temporary breakdown and reasonable stoppages for maintenance and repairs.

The substantial part of the refrigerator so far as its function is concerned is in the occupation and control of the landlords, and without the refrigerator this flat, having no larder, is incomplete for ordinary domestic living. The refrigeration should be maintained, in my view, so as not to deprive the tenants of the use of the fixtures, but there must no doubt be room for varying standards of efficiency.

In so far as the use was given of "the fixtures and fittings "therein belonging to the landlord" and the refrigerator was not specifically mentioned, it may be that a similar construction should, on the face of it, be applied to all the fixtures and fittings so let. Having regard to the unusual and particular feature of the refrigerator (not being a complete fixture in the control of the tenants and the major part of the whole remaining in the landlords' control) I am not sure that that is a necessary construction, but clearly it could not apply to any of the fixtures and

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fittings referred to in clause 2 (iii) which expressly excludes them and places the obligation to maintain and repair them on the tenants.

The presence of hot water radiators or pipes in a flat, which "go with" the demised premises, are not, possibly, quite in the same category as a refrigerator. Even if the premises are let "with the use of the hot water radiators" this may not, in itself, require a landlord to provide hot water. A central heating system is not used for many months in a year and it may be very much a matter of choice for what period it should be utilized. It is not as vital for the use of a flat as a refrigerator where no other reasonable place for keeping food is provided. But this question does not arise in this case and I would reserve any decision on it.

Apparently the landlords acquired this property from the previous landlord on or about October 1, 1956, and as they gave no evidence or explanation why the failure of the refrigerator coincided with the change of ownership it is a reasonable inference that the new landlords decided to discontinue the service. There was no offer of a reduction in rent, although the tenants were deprived of a facility for which they had contracted to pay in their inclusive rent.

The trial judge found a breach of contract in respect of the refrigeration. I would not hold that he was wrong in so doing and there was no challenge to the amount awarded as damages.

I would dismiss the appeal.

Appeal allowed. Leave to appeal to House of Lords.

Solicitors: *Harewood & Co.; Syed A. Rafique.*

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Lord Goddard C.J., Cassels and Diplock JJ.

REGINA *v.* MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION). *Ex parte* HUBBLE.

National Insurance—Industrial injuries benefit—Jurisdiction of medical appeal tribunal—Appeal by claimant—Power to set aside award of medical board in claimant's favour—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 39 (2) (3).

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

National Insurance — Industrial injuries benefit — Fresh evidence — Power to review previous decision—Further report of surgeon on claimant's injury—Whether "fresh evidence"—Meaning of "non-"disclosure"—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 40 (1).

Evidence—Fresh evidence.

(1) The claimant, a coal miner, sustained an injury to his back in an accident on July 14, 1955, arising out of and in the course of his employment. After a series of provisional assessments of the extent of his disablement the medical board made a final assessment of the extent of his disability at five per cent. for life from May 13, 1957. The claimant appealed against the smallness of the percentage assessment of the extent of his disablement to a medical appeal tribunal under section 39 (2) of the National Insurance (Industrial Injuries) Act, 1946.[1] There was no reference

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[1] National Insurance (Industrial Injuries) Act, 1946, s. 36: "(1) Subject to the provisions of this Part "of this Act, any of the following "questions arising under this Act "shall be determined as provided by "this subsection, that is to say—. . . "(*c*) any question—(i) whether the "relevant accident has resulted in a "loss of faculty; (ii) whether a loss "of faculty is likely to be permanent; "(iii) at what degree the extent of "disablement resulting from a loss of "faculty is to be assessed, and what "period is to be taken into account "by the assessment; shall be determined by a medical board or medical appeal tribunal constituted in "accordance with the following provisions of this Act. . . . (3) Except "as provided by this Part of this Act "or by the Family Allowances Act, "1945, as applied by paragraph (*b*) "of subsection (1) of this section, "any decision of a claim or question "as provided by the foregoing provisions of this section shall be "final."

S. 38: "(1) Medical boards for "the purposes of this Act shall be "appointed by the Minister and shall "consist of two or more medical "practitioners of whom one shall be "appointed as chairman: Provided "that the Minister may arrange with "any other Government department "that any medical board consisting of "two or more medical practitioners "appointed or recognized by that "department shall be a medical board "for the purposes of this Act. (2) "Medical appeal tribunals for the purposes of this Act shall be appointed "by the Minister and shall consist "of a chairman and two medical "practitioners. (3) Subject as aforesaid the constitution of medical "boards and medical appeal tribunals "shall be determined by regulations."

S. 39: "(1) The case of any "claimant for disablement benefit "shall be referred by the insurance "officer to a medical board for determination of the disablement questions in accordance with the following provisions of this Part of this "Act relating to the determination of "claims, and if, on that or any subsequent reference, the extent of "the disablement is provisionally "assessed, shall again be so referred "not later than the end of the period "taken into account by the provisional "assessment. (2) If the claimant is "dissatisfied with the decision of a "medical board, he may appeal in the "prescribed manner and within the "prescribed time and the case shall "be referred to the medical appeal "tribunal: Provided that an appeal "shall not lie against a provisional "assessment of the extent of disablement before the expiration of two "years from the date of the first "reference of the case to a medical "board under the foregoing subsection, nor where the period taken "into account by the assessment falls

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to the tribunal by the insurance officer on behalf of the Minister under section 39 (3) of the Act of 1946, and the only contention before the tribunal was that the award was too small. By their decision of July 15, 1957, the tribunal set aside the award of the medical board finding that any loss of faculty that may have been received was due to an aggravation of a pre-existing condition and that the aggravation had ceased by May 12, 1957.

A report by a surgeon dated June 28, 1957, had been tendered to the tribunal on the claimant's behalf stating that it was too early to estimate the final assessment of the disability.

(2) Subsequently, on August 2, 1957, the claimant had a further examination by the surgeon, who in his report stated that an operation which the claimant had undergone on July 4, 1957, disclosed the presence of a disc injury, that the disability was the result of an injury, and that the permanent disability would be more than 5 per cent. On the basis of this report the claimant asked for a review of his case under section 40 (1) of the Act of 1946. The reviewing medical board made a provisional assessment

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"wholly within the said two years. "(3) If the Minister notifies the insurance officer within the prescribed "time that he is of opinion that any "decision of a medical board ought "to be considered by a medical appeal "tribunal, the insurance officer shall "refer the case to a medical appeal "tribunal for their consideration, and "the tribunal may confirm, reverse "or vary the decision in whole or in "part as on an appeal."

S. 40: "(1) Any decision under this "Act of a medical board or a medical "appeal tribunal may be reviewed at "any time by a medical board if "satisfied by fresh evidence that the "decision was given in consequence "of the non-disclosure or misrepresentation by the claimant or any "other person of a material fact "(whether the non-disclosure or misrepresentation was or was not "fraudulent). (2) Any assessment of "the extent of the disablement resulting from the relevant loss of faculty "may also be reviewed by a medical "board, if satisfied that since the "making of the assessment there has "been a substantial and unforeseen "aggravation of the results of the "relevant injury: Provided that an "assessment shall not be revised "under this subsection unless the "medical board are of opinion that, "having regard to the period taken "into account by the assessment "and the probable duration of the "aggravation aforesaid, substantial "injustice will be done by not revising "it."

S. 50: "(1) Any decision under "this Act of an insurance officer, a "local appeal tribunal or the Commissioner may be reviewed at any "time by an insurance officer, or, "on a reference from an insurance "officer, by a local appeal tribunal, "if—(*a*) he or they is or are satisfied "by fresh evidence that the decision "was given in ignorance of, or was "based on a mistake as to, some "material fact; . . ."

National Insurance (Industrial Injuries) Act, 1953, s. 4: "(3) Where, "in connexion with a claim for disablement benefit, it is decided that "the relevant accident has not "resulted in a loss of faculty the "decision — (*a*) may be reviewed "under subsection (2) of section forty "of the principal Act as if it were "an assessment of the extent of disablement resulting from a relevant "loss of faculty; but (*b*) subject to "any further decision on appeal or "review, shall be treated as deciding "the question whether the relevant "accident has so resulted both for the "time about which the decision was "given and for any subsequent time. ". . ."

of 10 per cent. from May 13, 1957, until June 16, 1957, and of 100 per cent. from July 17, 1957, until October 17, 1957. The decision of the reviewing medical board was referred by the Minister to the medical appeal tribunal under section 39 (3) of the Act of 1946. By their decision of October 28, 1957, the tribunal set aside the reviewing medical board's assessments, finding that the further report of the surgeon was not fresh evidence within section 40 (1) of the Act of 1946.

On applications by the claimant to quash both decisions of the medical appeal tribunal:—

Held, dismissing the applications, (1) that the medical appeal tribunal had jurisdiction to set aside the award of the medical board, even though there was no contention that the loss of faculty was not caused by the accident; when a case came before it, whether on an appeal by a claimant or on a reference by the Minister, its function was to determine the whole case de novo.

(2) That the further report of the surgeon of August 2, 1957, did not constitute fresh evidence and therefore there was no power to review the decision under section 40 (1) of the Act of 1946; "fresh evidence" was evidence which could not with reasonable diligence have been made available at the hearing, and bore a meaning similar to that which it had under the Summary Jurisdiction (Married Women) Act, 1895.

Johnson v. *Johnson* [1900] P. 19; 16 T.L.R. 26 followed.

Per curiam. "Non-disclosure" in section 40 (1) of the Act of 1946 means a failure to disclose a fact known to the person who does not disclose it.

APPLICATIONS for orders for certiorari to remove into the court two decisions dated respectively July 15 and October 28, 1957, of the Medical Appeal Tribunal (North Midland Region), made pursuant to the National Insurance (Industrial Injuries) Act, 1946.

The following facts are taken from the judgment.

First decision.—On July 14, 1955, the applicant, Horace Hubble, a coal miner, employed at Hucknall Colliery, Notts, sustained an injury to his back by accident arising out of and in the course of his employment. The injury was diagnosed as a prolapsed intervertebral disc, and he drew injury benefit for the various periods for which he was absent from work until the injury benefit period expired on January 12, 1956. Thereafter, the appropriate medical board at Mansfield made a number of successive provisional assessments of the extent of his disablement for relatively short periods, ultimately expiring on May 12, 1957, and on April 24, 1957, the medical board made a final assessment of the extent of his disability at 5 per cent. from May 13, 1957, for the period of his life, and found that the loss of faculty in respect of which the assessment was made resulted from the accident of

July 14, 1955. The effect of the finding was to entitle the applicant to a disablement gratuity under section 12 (6) of the National Insurance (Industrial Injuries) Act, 1946, of an amount which worked out at £67 10s.

On April 30, 1957, the applicant was again off work owing to his back condition and remained off work until on June 17, 1957, he was admitted to Harlow Wood Hospital where, on July 4, 1957, he underwent an operation for removal of a prolapsed disc.

On June 5, 1957, while awaiting admission to hospital, he appealed under section 39 (2) to the medical appeal tribunal against the medical board's decision of April 24, 1957, assessing the extent of his disablement at 5 per cent. The relevant regulations did not require a notice of appeal to be a formal document, but it had to contain a statement of the grounds on which the appeal was made. The applicant's notice of appeal was in the following terms: "Dear Sirs, I wish to appeal against the final "assessment of 5 per cent. awarded to me on 24.4.57. I have "only worked 4 days since 24.4.57 and am now awaiting admis- "sion to Harlow Wood Hospital. Yours faithfully, H. Hubble." This was an appeal against the smallness of the percentage assessment of the extent of his disablement on the grounds that on the medical facts 5 per cent. was too little.

Although the regulations did not provide for the Minister's submitting any written statement to the medical appeal tribunal, there were in fact submitted some written observations by the Minister concluding with a submission that "having regard to the "medical evidence (a) the [applicant's] back condition is only "partly attributable to the relevant accident, and (b) the relevant "loss of faculty has been correctly assessed."

The applicant's case was heard by the medical appeal tribunal on July 15, 1957. By that date the claimant had already undergone the operation of July 4, 1957, and was still in hospital. He was represented before the tribunal by a trades union official, who tendered a report by Mr. Malkin, a surgeon who had examined the claimant in hospital on June 28, 1957, before the operation, and expressed the view that it was too early to give an estimate of what the final assessment of the extent of his disablement should be. It appeared from Mr. Malkin's report that the claimant had in fact suffered from pain in his back as early as December, 1954, some seven months before the relevant accident of July 14, 1955.

At the hearing before the tribunal, the respective contentions of the applicant and the Minister were advanced. On July 31, 1957, the tribunal notified the claimant of their decision in the following terms: "Dear Sir, With reference to your claim for disablement benefit the medical appeal tribunal, which considered your case on 15.7.57, decided that (1) from May 13, 1957, there is no loss of faculty resulting from industrial accident on July 14, 1955. The findings of the tribunal are summarized as follows: Mr. Hubble is in hospital but we heard Mr. Clarke of the National Union of Mineworkers with the medical report of June 28, 1957, by Mr. Malkin. It is clear from the medical evidence before us, including the hospital notes, that any loss of faculty which may have resulted from the relevant accident was only an aggravation of a pre-existing condition, which aggravation had ceased by May 12, 1957. We set aside the assessment of medical board of April 24, 1957."

Second decision.—After the tribunal's decision of July 15, 1957, which was notified to the applicant on July 31, 1957, the applicant remained in hospital and was, on August 2, 1957, examined again by his surgeon, Mr. Malkin, who reported that the operation had disclosed that a disc injury was present. He expressed his opinion that the applicant's disability was the result of an injury, and that his permanent disability would be more than 5 per cent. This report did not differ substantially from his previous report of June 28, 1957, except that he had now obtained positive confirmation of his previous suspicions that a disc injury was present, and he was now prepared to say that the permanent disability would be more than 5 per cent. Armed with this report, the applicant on August 4, 1957, asked for a review under section 40 (1) of the Act by the medical board of the tribunal's decision of July 15, 1957, on the ground that fresh evidence showed that the tribunal's decision was given in consequence of non-disclosure or misrepresentation. On August 28, 1957, the medical board decided that there was such fresh evidence, the nature of which they stated in the following terms: "The claimant, Mr. Hubble, was admitted to Harlow Wood on June 17, 1957, operation July 4, 1957, for prolapsed intervertebral disc. Bone graft from left ilium followed by plaster of Paris and now confined in strict bed and still a patient at Harlow Wood. Also a further report confirming the above from Mr. Malkin's letter August 2, 1957." They made provisional assessments of the extent of the disablement from May 13 to June 17, 1957, of 10 per cent. and from June 17 to October 17, 1957, of 100 per cent.

The Minister then directed the insurance officer to refer the case to the medical appeal tribunal under section 39 (3) of the

Act. It was heard by the tribunal on October 28, 1957, who decided that there was no "fresh evidence" to show that their decision of July 15 was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact. They therefore set aside the decision of the medical board of August 28, 1957.

In their reasons for their decision, they purported to follow a decision of the Industrial Injuries Commissioner under section 50 of the Act that "fresh evidence means some evidence which the "claimant was unable to produce before the decision under review "was given or which he could not reasonably be expected to have "produced in the circumstances of the case." As the operation took place on July 4, 1957, 11 days before the hearing of the original appeal, the tribunal took the view that there was sufficient time for the claimant to have obtained a further report from Mr. Malkin on the results of the operation, and the conclusions to be drawn from it before the applicant's case was heard by them on July 15, 1957.

The applicant contended that the decision of the tribunal notified on July 31, 1957, setting aside the assessment of the medical board without having before it an application by the Minister under section 39 (3) of the Act of 1946 was made without jurisdiction; it was further contended that the decision of the tribunal notified on November 1, 1957, setting aside the decision of the reviewing medical board was wrong in law, apparent on the face of the decision, in holding that fresh evidence meant evidence which the applicant was unable to produce before the decision notified on July 31, 1957, or which he could not reasonably have been expected to produce in the circumstances of the case.

The applicant therefore moved to bring up and quash both decisions.

F. W. Beney Q.C. and *H. S. Ruttle* for the applicant. The submission made on behalf of the Minister at the hearing before the medical appeal tribunal on July 15, 1957, was that the claimant's disability was partly due to the accident and that the medical board had correctly assessed his loss of faculty at 5 per cent. The tribunal found that any loss of faculty resulting from the accident was only an aggravation of his pre-accident condition, and that the aggravation had ceased by May 12, 1957. The tribunal therefore set aside the board's award, and the issue in the first case is whether they had jurisdiction to do so. That depends on the construction of section 39 of the Act of 1946. The language of section 39 (3) shows that the tribunal can set aside an award where there has been a notification by the Minister to the insurance officer to refer the case to the tribunal, but the notification by the Minister is a condition precedent to the exercise of the tribunal's power and, in the absence of that condition, it has no power other than to allow or dismiss a claimant's appeal. If the tribunal can set aside an award without a notification by the Minister to the insurance officer, there is no point in the subsection. The decision of the tribunal was accordingly made without jurisdiction. If a plaintiff in a personal injuries action appeals only on the quantum of damages awarded him by the trial judge, and the defendant resists the appeal solely on that ground, the Court of Appeal will not interfere with the trial judge's findings on liability.

The issue in the second case is whether the further report of Mr. Malkin was fresh evidence within the meaning of section 40 of the Act of 1946. The tribunal in their decision, notified to the claimant on November 1, 1957, said that it was not fresh evidence because Clarke at the hearing on July 15, 1957, could have asked for an adjournment and obtained the report. The tribunal purported to follow a decision of the Industrial Injuries Commissioner on section 50 of the Act that fresh evidence meant evidence which the applicant for a review of his case was unable to produce or could not reasonably be expected to produce in the circumstances of the case. A reference to that decision shows that it has nothing to do with this case. The circumstances in which cases can be reviewed under sections 50 and 40 are quite different; the latter section is much more limited. The commissioner applied the same principles as those applied by the Court of Appeal when determining whether to exercise its discretion to admit further evidence under R.S.C., Ord. 58, r. 9. But in this section there is no requirement of the exercise of a discretion; the power is given widely.

[LORD GODDARD C.J. In the case of a proposal for insurance, non-disclosure means non-disclosure of a known fact. How could there be non-disclosure of an unknown fact?]

It depends upon the context. The broad object here is to provide a means of correcting erroneous decisions given in ignorance of the true facts. Insurance calls for good faith on the part of the proposer—no more. It would be a remarkable limitation on the section that if there was an omission to reveal a known fact, the tribunal could review the case, but that if the fact was not known to anyone, the tribunal could not review the case. The further report of the surgeon was "fresh evidence" within section 40.

Rodger Winn for the Minister of Pensions and National Insurance. When a case is taken by either the claimant or the Minister to a medical appeal tribunal, the question for the tribunal's determination is res integra—the tribunal embarks on the case de novo. The proceedings before the board and the tribunal should be informal. It would be unfortunate if those proceedings were to require compliance with formalities in order to found jurisdiction.

In *Stepney Borough Council* v. *Joffe*,[2] which concerned an appeal against the grant of a licence for street trading, it was said that where there is an unrestricted right of appeal the appellate tribunal can substitute its own opinion. On the other hand, in *Reg.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Hierowski*,[3] Parker J. rejected the contention that rent tribunals concerned with the control of furnished lettings had the power of reviewing cases de novo. And in *Ellerby* v. *March*[4] Somervell L.J. said[5] that appellate courts would not normally give effect to contentions not put to them. But other cases show that courts will decide issues not presented to them. In *Gordon-Cumming* v. *Houldsworth*,[6] where the issue was what was the effect of a contract, the House of Lords said that there was no contract. That decision has recently been followed in *Quigley* v. *Mathieson Gee (Ayrshire) Ltd.*[7]

Once the matter was before the appeal tribunal, the whole case involved in the claim of the applicant was referred to it. The purpose of section 40 (1) is to ensure that a claimant shall not be able to go from doctor to doctor in order to upset a decision of a medical board. There can be no non-disclosure unless there is knowledge of a fact. Non-disclosure involves a mental choice to suppress.

[Lord Goddard C.J. If one does not know, he cannot disclose.]

The union representative was ignorant of the operation on July 4. He could not have been guilty of non-disclosure. In the matrimonial jurisdiction magistrates' courts act on "fresh evidence." The term should bear the same meaning in this context. In *Johnson* v. *Johnson*[8] two alternative conditions were laid down to permit something to be fresh evidence: it had to be either something which was not available at the trial—something which had happened since; or else something which could not with reasonable diligence have been made available at the trial. That statement of the law has been followed in *Corbett* v. *Corbett*,[9] *Newman* v. *Newman*[10] and *Bowen* v. *Bowen*.[11] To achieve finality Parliament has deliberately limited the meaning of "fresh evidence" in the way indicated.

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[2] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

[3] [1953] 2 Q.B. 147; [1953] 2 All E.R. 4.

[4] [1954] 2 Q.B. 357; [1954] 2 All E.R. 375.

[5] [1954] 2 Q.B. 357, 364.

[6] [1910] A.C. 537.

[7] [1952] W.N. 193; sub nom. *Mathieson Gee (Ayrshire) Ltd.* v. *Quigley*, 1952 S.C.(H.L.) 38; 1952 S.L.T. 239.

Beney Q.C. in reply. If fresh evidence must relate to something that has happened since the hearing, or something which could not with reasonable diligence have been made available at the hearing, and the non-disclosure must be of some known fact, little scope, if any, is left for the operation of the section. A future fact could not have been known and evidence of a fact known but not obtainable by reasonable diligence must cover a very narrow field indeed. As to the section being used to go from doctor to doctor in order to upset a decision, this could hardly be done because the material fact not disclosed is not the opinion of a doctor but the fact upon which such opinion is based.

Cur. adv. vult.

LORD GODDARD C.J. Diplock J. will give the judgment of the court.

DIPLOCK J. These are applications for orders of certiorari to remove into this court two decisions dated respectively July 15 and October 28, 1957, of the Medical Appeal Tribunal (North Midland Region), made pursuant to the National Insurance (Industrial Injuries) Act, 1946.

As its long title states, that Act substituted for the Workmen's Compensation Acts, 1925–1945, a system of insurance against personal injuries caused by accident arising out of or in the course of a person's employment. Part I of the Act makes provision for the funds required for paying benefits under the Act to be raised from contributions by employers and insured persons and from moneys provided by Parliament. Part II provides for the various classes of benefit to be paid to insured persons who suffer personal injury caused by accident arising out of and in the course of their employment. Such a person is entitled in the first instance to daily " injury benefit " while he is incapable of doing work, up to a maximum period of some six months from the date of the accident. Thereafter he is entitled to " disablement " benefit " if he suffers as a result of the injury from loss of physical or mental faculty. It is with the applicant's right to disablement benefit that the present cases are concerned. The amount of disablement benefit to which an insured person is entitled depends upon the extent of his disablement, which is required to be assessed in accordance with the principles laid down in section 12 of the Act.

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[8] [1900] P. 19; 16 T.L.R. 26.

[9] [1953] P. 205; [1953] 2 All E.R. 69.

[10] [1958] 1 W.L.R. 35; [1957] 3 All E.R. 698.

[11] [1958] 1 W.L.R. 508; [1958] 1 All E.R. 770.

It is sufficient for the purpose of the present cases to draw attention to the facts, first, that the disablement is not to be treated as resulting from the injury if the loss of physical or mental faculty from which the insured person suffers is one to which he would in any case have been subject as a result of a congenital defect or of an injury or disease received or contracted before the relevant accident; secondly, that the extent of disablement is to be assessed on a percentage basis adopting as a standard certain prescribed loss of faculty which is to be taken as amounting to 100 per cent. disablement; and, thirdly, that the extent of disablement is in no way dependent upon loss of earning power or additional expense. Other provisions of the Act provide for increase of benefit in respect of these matters. And, finally, the assessment may be either final (that is, taking into account the whole of the period for which the loss of faculty may be expected to continue), or provisional (that is, taking into account some shorter period), according to whether or not the possibility of changes in the insured person's condition allow of a final assessment being made.

It is to be observed that all the issues which arise upon the determination of the existence, and the assessment of the extent, of the disablement depend upon matters of medical fact and opinion. It is not, therefore, surprising when one turns to Part III of the Act, which deals with the determination of questions and claims, to find it provided by section 36 (1) (*c*) of the Act that " any question (i) whether the relevant accident has resulted " in a loss of faculty; (ii) whether a loss of faculty is likely to " be permanent; (iii) at what degree the extent of disablement " resulting from a loss of faculty is to be assessed and what " period is to be taken into account by the assessment; shall be

" determined by a medical board or medical appeal tribunal con-" stituted in accordance with the following provisions of this " Act." By subsection (3) any decision of any of such questions (referred to thereafter in the Act as " disablement questions ") by a medical board or medical appeal tribunal is to be final, except as provided by Part III of the Act.

By section 38 medical boards are to consist of two or more medical practitioners, and medical appeal tribunals are to consist of a chairman (who in practice is generally a Queen's Counsel) and two medical practitioners. All claims for benefit, including claims for disablement benefit, are by section 48 of the Act to be submitted by the claimant in the first instance to an insurance officer. Any claim for disablement benefit necessarily involves one or more " disablement questions."

First Case.—Section 39, upon the true construction of which the first of the cases now under consideration turns, lays down the procedure to be adopted once a claim for disablement benefit has been submitted to the insurance officer.

[His Lordship read section 39, stated the facts relevant to the first case and continued:] Although the regulations do not provide for the Minister's submitting any written statement to the medical appeal tribunal, there were in fact submitted, in accordance with what is apparently the usual practice, some written observations by the Minister on the medical aspects of the case concluding with a submission that " having regard to the medical evidence (a) the " claimant's back condition is only partly attributable to the " relevant accident, and (b) the relevant loss of faculty has been " correctly assessed."

It is thus clear that neither the claimant nor the Minister was contending that the claimant's injury was not attributable at least in part to the accident, nor was the Minister contending that the 5 per cent. assessment was too high. The claimant was contending it was too small. This was the only difference between them. Further, the claimant's case was referred to the medical appeal tribunal solely as a result of the claimant appealing from the decision of the medical board, under section 39 (2). It was never referred to the tribunal by the insurance officer upon the direction of the Minister under subsection (3).

It is seen from the tribunal's decision that so far from allowing the appeal they set aside even the assessment of 5 per cent. disability, a finding for which neither the claimant nor the Minister, through the insurance officer, had contended.

Mr. Beney, on behalf of the claimant, submits that in so doing the tribunal acted without jurisdiction. Their jurisdiction, he says, upon a reference under section 39 (2), is limited to either acceding in whole or in part to the contentions of the appellant claimant and allowing the appeal, or dismissing the appeal with the consequence that the decision of the medical board appealed from stands. The tribunal have no jurisdiction to reduce or set aside the medical board's assessment unless the Minister has, in effect, cross-appealed by himself directing the insurance officer to refer the case to the tribunal under subsection (3). Alternatively, Mr. Beney says that the tribunal have no jurisdiction to reduce or set aside the medical board's assessment where, as in this case, upon an appeal by the claimant, the Minister or insurance officer does not put forward to the tribunal any contention that the assessment should be reduced or set aside. In other words, he seeks to apply to the reference of a case to a medical appeal tribunal upon an appeal by a claimant under section 39 (2) of the Act the rules and practice adopted by the Court of Appeal in ordinary civil litigation.

We think that this submission is based upon a misapprehension of the purpose of the Act and the functions of medical boards and medical appeal tribunals. A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer. Any such claim requires investigation to determine whether any and if so what amount of benefit is payable out of the fund. In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action. Where the claim is for disablement benefit, a necessary step in the investigation is the determination of one or more questions of medical fact and opinion, and accordingly, where such a claim is made section 39 (1) makes it mandatory upon the insurance officer to refer "the case" of the claimant to a medical board for the determination, not of the claim, but of the disablement questions which require to be investigated. As an expert investigating body it is the right and duty of the medical board to use their own expertise in deciding the medical questions referred to them. They may, if they think fit, make their own examination of the claimant and consider any other facts and material to enable them to reach their expert conclusion as doctors do in diagnosis and prognosis of the case of an ordinary patient. Just as it is "the "case" of the claimant which is to be referred to the medical board by subsection (1) of section 39, so also it is "the case" of the claimant which is to be referred to the medical appeal tribunal under subsections (2) and (3).

The effect of these subsections is, in our view, to substitute in the cases to which they apply another and presumably more highly qualified expert investigating body for the medical board, and we see no grounds for holding that their function is any different from that of the medical board, namely, to use their own expertise to reach their own expert conclusions upon the matters of medical fact and opinion involved in "the case" of the claimant.

Mr. Beney does not indeed contend that, if the case is referred to the medical appeal tribunal by the insurance officer under subsection (3), the tribunal has not an unrestricted right and duty to reach its own conclusions de novo whatever may have been the decision of the medical board. The words "the tribunal may "confirm, reverse or vary the decision in whole or in part" are too compelling. (Compare *Stepney Borough Council* v. *Joffe*.[1]) That those words in subsection (3) are followed by the words "as "on an appeal" point strongly to the conclusion that the tribunal have a similar power when "the case" is transferred to the tribunal consequent upon an appeal by a dissatisfied claimant under subsection (2). It would, we think, indeed be a strange conclusion if the medical appeal tribunal, an expert investigating body, was bound to substitute its opinion on technical medical matters for that of the medical board when its opinion was more favourable to the claimant and was not entitled to do so when its opinion was less favourable. So to circumscribe the powers of the medical appeal tribunal would be to take away from them the function of determining "disablement questions" expressly conferred upon them by subsection (3) of section 36 of the Act. As there is no lis inter partes in such a determination we see no grounds for limiting the unfettered powers conferred upon them by the terms of the Act to determine disablement questions when the case is referred to them under section 39 (2) by applying rules of practice adopted by appellate courts in ordinary litigation between adverse parties to an inquiry or investigation to which such litigation bears no true analogy.

[1] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

The application for certiorari in respect of the decision of July 15, 1957, is, accordingly, dismissed.

Second Case: Section 40 (1) of the Act, upon the true construction of which the second case largely turns, is in the following terms: [His Lordship read the section, stated the facts relevant to the second case and continued:]

For a decision to be reviewed under section 40 (1) of the Act two conditions must be fulfilled: first, the board or the tribunal must be satisfied that the decision to be reviewed was given in consequence of the non-disclosure or misrepresentation of the claimant or any other person of a material fact (whether the non-disclosure or misrepresentation was or was not fraudulent), and secondly, the board or tribunal must be so satisfied by fresh evidence.

As regards the first condition, Mr. Beney submits that it is fulfilled if there is any omission by the claimant or any other person to put before the board or tribunal any material fact, whether known to the claimant or such other person at the time of the hearing of the decision under review or not. As regards the second condition, he contends that "fresh evidence" simply means further evidence whether it was, or could with reasonable diligence have been, available at the time of the original hearing or not.

If Mr. Beney were right, it would mean that any claimant—or presumably any insurance officer—if dissatisfied by a decision of a medical appeal tribunal, could go and get an opinion from another doctor, and relying upon this or anything contained in it as a material fact, apply for a review. If unsuccessful, the process could be repeated any number of times by obtaining fresh opinions from fresh medical men.

We think that both submissions are wrong. "Non-" disclosure" in the context of the subsection, where it is coupled with misrepresentation, means a failure to disclose a fact known to the person who does not disclose it. The term "non-" disclosure" is a familiar term in insurance law. It may be innocent if the person failing to disclose the fact does not appreciate its materiality: fraudulent if he does. But there can be no non-disclosure of a fact which is not known. That the draftsman of the Act appreciated the distinction between non-disclosure of facts and ignorance of them is evident from the provisions of section 50 (1) (*a*) of the Act, which provides for a

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review of decisions (on matters other than medical matters) of an insurance officer, a local appeal tribunal or the commissioner if "he or they are satisfied by fresh evidence that the decision was "given in ignorance of, or was based on a mistake as to, some "material fact."

It does not appear from the material before us whether there were any material facts relating to the operation of July 4, 1957, or the claimant's condition thereafter which were known to the claimant or the union official, who represented him at the time of the hearing of July 15, 1957, and were not disclosed to the tribunal then. As the tribunal based their decision of October 28, 1957, on their view of the meaning of "fresh evidence," there is no express finding as to this. If, therefore, we were of opinion that they were wrong as to the meaning of "fresh evidence," further facts might be necessary to enable us to come to a conclusion.

The statute requires the board or tribunal to be satisfied not by "further evidence"—a familiar and it may be a non-committal term—but by "fresh evidence," an expression used in analogous circumstances in the Summary Jurisdiction (Married Women) Act, 1895, which has been the subject of well-established and consistent judicial interpretation. We cannot do better than adopt the words of Sir Henry Jeune P. in *Johnson* v. *Johnson*[2]: "It means practically the same sort of evidence as "that upon which a new trial would in the ordinary course be "granted; it must relate to something which has happened since "the former hearing or trial, or it must be evidence which has "come to the knowledge of the party applying since that hearing "or trial, and which could not by reasonable means have come to "his knowledge before that time. It must amount to what was "called in the old forms of pleading res noviter ad notitiam "preventa. It is altogether a mistake to suppose that 'fresh "'evidence' within the meaning of the Act of 1895 means or "includes evidence which could have been called but which was "not in fact adduced at the first hearing. It would be monstrous "to suppose that a party could abstain from calling evidence "and could thereafter proceed to make application upon application based on evidence which might have been tendered in the "first instance."

In the context of the present subsection it would be even more monstrous to suppose that a party could fail to disclose or misrepresent (even fraudulently) a material fact known to him and could thereafter proceed to make application upon application for a review based upon successive corrections of non-disclosures or misrepresentations of which he was guilty in the first instance.

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[2] [1900] P. 19, 21; 16 T.L.R. 26.

It is not contended by Mr. Beney that, even if the material before us had shown a " non-disclosure " (in the sense we have given to that expression) of a material fact at the hearing by the tribunal on July 15, there was any " fresh evidence " in the above sense before the medical board on August 28 or before the medical appeal tribunal on October 28, 1957. The decision of the tribunal of October 28, 1957, was therefore so far as appears upon its face correct in law, although there may have been an additional reason for arriving at the same conclusion owing to the absence of any evidence, either fresh or otherwise, of any " non-" disclosure or misrepresentation by the claimant or any other " person " at the original hearing on July 15, 1957.

The application for certiorari in respect of the decision of October 28, 1957, is therefore dismissed.

The conclusions we have reached in these two cases illustrate what we think is a consistent scheme in the Act as regards the determination of " disablement questions." These are purely matters of medical fact and opinion to be decided by expert investigating bodies, either the medical board or, if the claimant or the Minister is not content with the decision of the medical board, by the medical appeal tribunal which substitutes its expert opinion for that of the medical board. Prima facie. the decision of the medical appeal tribunal is final; but it may be reopened in three circumstances: first, under section 40 (1) if the decision has been induced by non-disclosure or misrepresentation of a medical fact by any person, not necessarily the claimant, being a material fact which was not known and could not by reasonable means have been known at the time of the original hearing to the person seeking to reopen the matter. It follows, therefore, that a person guilty of non-disclosure or misrepresentation can never seek to reopen the matter on these grounds.

Secondly, it may be reopened under section 40 (2) as amended by the National Insurance (Industrial Injuries) Act, 1953, if since the date of the decision there has been an unforeseen aggravation of the results of the relevant injury.

Thirdly, under section 4 (3) of the Act of 1953 there can be reopened in like manner and in similar circumstances a decision, such as that in the first of the present cases, that the relevant

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accident has not resulted in a loss of faculty. It was not, however, upon this ground that the appellant applied for a review. Nothing in our decision today affects his right to do so if he should be so advised; but that depends upon matters of medical fact and opinion which are outside our competence.

Applications dismissed.

Solicitors: *Taylor, Jelf & Co., agents for Hopkin & Sons, Nottingham; Solicitor, Ministry of Pensions and National Insurance.*

[NEWCASTLE-UPON-TYNE ASSIZES.]

GREEN *v.* FIBREGLASS LTD.

[1957 G. No. 439.]

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May 14,
15, 23.

Salmon J.

Licensor and Licensee—Independent contractor—Negligence of—Office cleaner—Defective electrical installation—Installed by expert contractors—Issue of liability of occupier of offices—Invitee.

Licensor and Licensee—Invitee or licensee—Duty of occupier—Liability solely in negligence.

The defendants were the tenants and occupiers of certain offices. By agreement with the defendants the plaintiff undertook the cleaning of the offices by herself or her employees. The manner and time in which the work was to be done were entirely within the plaintiff's own discretion and when on the premises she was not the servant of the defendants but was their invitee. On July 31, 1956, when cleaning an electric fire in the offices, the plaintiff sustained severe electrical burns caused by faulty wiring of the wires leading from the mains to the switch and socket into which the electric fire was plugged. When the defendants became tenants of the offices in 1951 they had taken the precaution of having them completely rewired by reputable expert electrical contractors, and it was due to the negligence of one of the contractors' workmen that the switch was dangerously wired. The defendants had no reason to suppose that the contractors had been negligent or that the installation was unsafe:—

Held, that the defendants had discharged their duty to the plaintiff as invitors by employing competent electrical contractors; if some act was to be performed which called for special knowledge and experience which an invitor could not be expected to possess,

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

he fulfilled his duty of care by employing a qualified and reputable expert to do the act.

Haseldine v. *C. A. Daw & Son Ltd.* [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156 applied.

Dalton v. *Angus* (1881) 6 App.Cas. 740; *Hughes* v. *Percival* (1883) 8 App.Cas. 443; *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628; and *Thomson* v. *Cremin* [1956] 1 W.L.R. 103n., 110; [1953] 2 All E.R. 1185 distinguished.

Per Salmon J. (considering dictum of Lord Wright in *Thomson* v. *Cremin*). I doubt whether it is helpful to import into this branch of the law the conception of warranty. That seems to me to belong exclusively to the law of contract. The obligation of an invitor to an invitee has nothing to do with the law of contract or quasi-contract. . . . The invitee's cause of action lies in negligence and nothing else.

ACTION.

The plaintiff, Annie Thomas Green, claimed damages for injuries caused by the alleged negligence of the defendants, their servants or agents. The following statement of facts is summarized from the judgment:

The defendants were the tenants and occupiers of certain offices at 16, Dean Street, Newcastle-upon-Tyne, a fairly large building containing a number of other offices let to other tenants. The plaintiff was employed by the landlords as caretaker of the whole of 16, Dean Street, and by agreement with various tenants arranged for the cleaning of the various offices and employed for that purpose a number of charwomen. By agreement with the defendants, their offices were regularly cleaned by one or more of the charwomen employed by her, and occasionally, when one of the charwomen was ill or on holiday, the plaintiff would clean or help to clean these offices herself. Salmon J. held that the evidence did not establish that the plaintiff was a servant of the defendants. She was not subject to the control or direction of the defendants, and the manner and time in which the work was to be done were entirely within the plaintiff's own discretion.

On July 31, 1956, owing to the absence of one of the charwomen, the plaintiff was herself helping to clean the defendants' offices. While she was attempting to clean an electric fire with a duster she received severe electrical burns, as a result of which the fingers of her right hand had to be amputated. She was left with only the thumb and a small stump of one finger on that hand. At the time of the accident, the electric fire was plugged into a wall socket which was controlled by the normal type of switch.

The switch was in the "Off" position and the fire was cold. Nevertheless, the element was alive. There was no fault in the electric fire itself. The wiring from the main switch to the socket was faulty. There were three wires concerned: the earth wire, the line or live wire, and the neutral wire. According to good electrical practice, these wires should each be of a different colour so as to avoid confusion; in fact, they were all coloured red. The line wire should go through, and be controlled by, the switch. At the time of the accident, owing to negligence on the part of the electrical contractor concerned, the neutral wire and not the line wire was connected with the switch, so that if the switch was on, the element in the electric fire glowed and gave out heat in the usual way, but, when the switch was off, the element faded and ceased to give out heat but continued to be charged with electricity.

When the defendants became tenants of the offices in 1951, they had them completely rewired by Cairns (Newcastle) Ltd., electrical contractors. Salmon J. held that it was due to the negligence of one of that company's workmen that the switch was, in the first place, negligently and dangerously wired.

P. Stanley Price Q.C. and *Lyall Wilkes* for the plaintiff. The plaintiff was a servant of the defendants. If she was an invitee, the defendants as invitors are liable for the negligence of their independent contractors in respect of the condition of the premises: *Thomson* v. *Cremin.*[1] *Haseldine* v. *Daw & Son Ltd.*[2] is inconsistent with the opinions of the House of Lords in *Thomson* v. *Cremin*[3] and should not be followed. If the principle of *Haseldine* v. *Daw & Son Ltd.*[4] is still to be followed, it is a matter of defence and the defendants have not brought themselves within it; they did not have any inspections made of the electrical system, and after the system had been installed they introduced new electrical plant, namely, the offending fire, without taking any steps to see that it was not dangerous. See also *Hartley* v. *Mayoh & Co.*[5]

G. S. Waller Q.C. and *J. R. Johnson* for the defendants. The duty owed to the plaintiff as an invitee was lower than that owed to a servant and did not include liability for the negligence of an independent contractor who performed work of a specialist nature normally entrusted to an expert. In *Thomson* v. *Cremin*[6] the work left to the contractors was work which the shipowner himself was competent to do, and on the facts of that case counsel for the appellant did not argue that the shipowner was not responsible for the work of the sub-contractor. The dictum of Lord Wright[7] in that case goes too far. The distinction between that case and *Haseldine* v. *Daw & Son Ltd.*[8] lies in the nature of the task which the contractor performed: see *Woodward* v. *Mayor of Hastings*[9] and the passage there referred to[10] from the judgment of Scott L.J. in *Haseldine* v. *Daw & Son Ltd.*[11] The present case is indistinguishable from *Haseldine* v. *Daw & Son Ltd.*,[12] in which the judgments of the Court of Appeal were delivered on July 31, 1941. *Wilkinson* v. *Rea Ltd.*,[13] which was approved in *Thomson* v. *Cremin*[14] and which had been decided in April, 1941, was not mentioned in *Haseldine* v. *Daw & Son Ltd.*[15] and cannot have been regarded as inconsistent.

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[1] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[2] [1941] 2 K.B. 343.

[3] [1956] 1 W.L.R. 103n.

[4] [1941] 2 K.B. 343.

[5] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

Cur. adv. vult.

May 23. SALMON J. stated the facts and continued: The question arises whether the defendants are responsible for the negligent wiring which caused this accident. I have held that the plaintiff was not a servant of the defendants; at the time of the accident she was the defendants' invitee. It is clearly settled that the defendants, as invitors, owe a duty to exercise due care for the safety of their invitee, the plaintiff. An invitor must use reasonable care to prevent damage from an unusual danger of which he knows or ought to know: *Indermaur* v. *Dames*.[1] What is reasonable care must depend upon the circumstances of each particular case. When the defendants took over these offices in 1951 they knew nothing about the wiring; the wiring, for all they knew, might then have been dangerously defective. They took the precaution, however, of having the offices completely rewired by Cairns (Newcastle) Ltd. I find that this company was, and the defendants reasonably believed them to be, a long-established firm with a high reputation as electrical contractors. It is true that the information before me on this point is not very detailed, but it appears from the documents that have been put in evidence that that company has been in business in Newcastle since 1905, and that its directors are well-qualified electrical engineers. No evidence was called by the plaintiff, nor were any questions put in cross-examination, to suggest that Cairns (Newcastle) Ltd. are other than competent experts, or that the defendants had any reason to doubt that fact. It is obvious that unless the electrical wiring of any premises is put into a safe condition, anyone using the premises may be exposed to danger of an unusual kind. Electrical wiring, however, is a matter for expert electrical contractors and is not ordinarily carried out by the occupier himself. How were the defendants to fulfil their duty to use reasonable care? I cannot think it was incumbent on them to send one of their directors or servants to a Polytechnic to take a course in electrical engineering and then attempt the rewiring themselves. In my view, they would discharge their duty of care by employing reputable and competent experts; and this they did. Nor had the defendants at any time thereafter any reason to suppose that the experts had been negligent, or that the electrical installation was unsafe.

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[6] [1956] 1 W.L.R. 103n.
[7] Ibid. 110.
[8] [1941] 2 K.B. 343.
[9] [1945] K.B. 174; 61 T.L.R. 94; [1944] 2 All E.R. 565.
[10] [1945] K.B. 174, 182.
[11] [1941] 2 K.B. 343, 356.
[12] [1941] 2 K.B. 343.
[13] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.
[14] [1956] 1 W.L.R. 103n.
[15] [1941] 2 K.B. 343.
[1] (1866) L.R. 1 C.P. 274.

This case seems to me to be indistinguishable from *Haseldine* v. *Daw & Son Ltd.*,[2] in which it was held that the owners of lifts discharge their duty of care to invitees by employing competent experts to attend to the lift for them. In that case, the lift in question became dangerous by reason of the negligence of one of the expert's servants and the plaintiff thereby suffered damage. It was held by the Court of Appeal that the defendants were not liable for the negligence of the servants of their independent contractor experts. Scott L.J. held that the plaintiff was an invitee; Goddard and Clauson L.JJ. did not decide whether he was a licensee or an invitee, but said that even if he were an invitee, his claim must still fail against the occupier. Mr. Stanley Price, on behalf of the plaintiff, has sought to distinguish that decision on the ground that in the present case the defendants did not employ experts to make regular inspections of the electrical installation. I am not impressed by that point. An ordinarily prudent man, it is true, would have his lift regularly examined and serviced by an expert. I cannot believe, however, that an ordinarily prudent man who had had his premises wholly rewired by experts would think of having the wiring examined within five years of its installation unless there was any special reason, such as an apparent fault, for him to do so. Here, there was no such reason. *Haseldine* v. *Daw & Son Ltd.*[3] was distinguished, but no doubt was cast upon it, by du Parcq L.J. in *Woodward* v. *Mayor of Hastings*,[4] and by Parker J. in *Bloomstein* v. *Railway Executive*.[5] Those were cases—as were *Pickard* v. *Smith*[6] and *Wilkinson* v. *Rea Ltd.*[7]—where the safety of the invitee depended upon the careful performance of some act which called for no technical knowledge or experience but upon acts which the courts held that the invitor could and should have done himself and which he neglected to do. In such cases, the invitor is liable for his neglect to do the act. It is no excuse for his failure to do that act that, for purposes of his own, he chooses to employ an independent contractor who has neglected to perform the act or to perform it carefully. du Parcq L.J. and Parker J. reaffirmed that in the *Haseldine* v. *Daw* class of case—to which the present case, in my judgment, clearly belongs—the invitor, because of his inherent lack of technical knowledge or experience, discharges his duty of care to the invitee, not by attempting to do the act himself but by employing a properly-qualified independent contractor to do it for him. In another context, *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*[8] and *Stennett* v. *Hancock*[9] are illustrations of the same principle.

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[2] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

It is well settled that generally in an action for negligence a man is not vicariously liable for the carelessness of an independent contractor. There are, of course, cases where, by virtue of a contract or by the operation of law, an obligation may be imposed on a man to do an act, or to ensure that it is done and done carefully. In such cases, the defendant cannot shelter behind any independent contractor whom he may have employed. If he breaches the obligation he is liable, not in negligence but in contract, as in *Maclenan* v. *Segar*,[10] or by reason of some breach of duty other than a duty to take care, as in *Dalton* v. *Angus*.[11] The master, too, owes special duties to his servant which he cannot delegate. Those duties, however, spring from the nature of the contract of service. I can find no authority for holding that an invitor owes the same duty to his invitee as a master does to his servant. "Ever since *Quarman* v. *Burnett*[12] it has been "considered settled law that one employing another is not liable "for his collateral negligence unless the relation of master and "servant existed between them. So that a person employing "a contractor to do work is not liable for the negligence of that "contractor or his servants. On the other hand, a person causing "something to be done, the doing of which casts on him a "duty, cannot escape from the responsibility attaching on him of "seeing that duty performed by delegating it to a contractor": *Dalton* v. *Angus*, *per* Lord Blackburn.[13] It is important to observe that the duty cast upon the defendant in that case was not a duty to take care but a duty not to let down the plaintiff's adjoining buildings whilst excavating on his own land, the plaintiff having acquired a right of support by 20 years' enjoyment of such support.

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[3] [1941] 2 K.B. 343.

[4] [1945] K.B. 174, 182; 61 T.L.R. 94, 95; [1944] 2 All E.R. 565, 567.

[5] [1952] 2 All E.R. 418.

[6] (1861) 10 C.B.N.S. 470.

[7] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.

[8] [1923] 1 K.B. 539; [1923] 2 K.B. 832; 39 T.L.R. 207.

[9] [1939] 2 All E.R. 578.

[10] [1917] 2 K.B. 325; 33 T.L.R. 351.

[11] (1881) 6 App.Cas. 740.

Hughes v. *Percival*,[14] *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.*[15] and *Black* v. *Christchurch Finance Co. Ltd.*[16] are exceptional cases because there the defendants were employing contractors to do extra hazardous acts, that is, acts which in their very nature involve in the eyes of the law special danger to others. It may be that such cases, like the master and servant cases, are an exception to the general rule that persons employing a contractor are not vicariously liable for his negligence or for the negligence of his servants.

On October 20, 1941, the House of Lords decided *Thomson* v. *Cremin*.[17] The judgment in *Haseldine* v. *Daw & Son Ltd.*[18] was delivered on July 31, 1941, that is, nearly three months before the decision in *Thomson* v. *Cremin*. It is argued by counsel for the plaintiff that I ought not to follow *Haseldine* v. *Daw* because that case is inconsistent with the decision in *Thomson* v. *Cremin*. I do not agree, although it must be conceded that some of the dicta of Lord Wright in *Thomson* v. *Cremin* are not easy to reconcile with *Haseldine* v. *Daw*. In my judgment, however, *Haseldine* v. *Daw* is not affected by *Thomson* v. *Cremin* and is binding on me. Moreover, in my humble view, it is consonant alike with principle, common sense, and, as I have attempted to show, the whole stream of authority. It is to be observed that the point decided in *Haseldine* v. *Daw* was not even argued in *Thomson* v. *Cremin*, nor did it arise. The appellant shipowner in *Thomson* v. *Cremin* had chosen to employ independent contractors to fit and secure a shore in his ship. As a result of the independent contractor's negligence, the first respondent (who was a stevedore's labourer) was injured. The work in question in that case does not seem to me to have called for any special technical knowledge or experience which the ordinary shipowner does not possess. The case, therefore, seems to me to fall within the class of cases illustrated by *Woodward* v. *Mayor of Hastings*[19] and *Bloomstein* v. *Railway Executive*[20] rather than by *Haseldine* v. *Daw*.

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[12] (1840) 6 M. & W. 499.

[13] 6 App.Cas. 740, 829.

[14] (1883) 8 App.Cas. 443.

[15] [1934] 1 K.B. 191; 50 T.L.R. 56.

[16] [1894] A.C. 48.

[17] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[18] [1941] 2 K.B. 343.

The facts which might have been relevant to the point I am now considering are not fully set out in *Thomson* v. *Cremin* as they would have been had the point there been under consideration. It appears, however, from the speech of Lord Porter[21] that the appellant may well have been in control of the ship's hold and directing operations at the time of the erection of the shore. Viscount Simon (with whose speech Lord Romer concurred) and Lord Porter pointed out that the case turned almost entirely on questions of fact. I cannot think that they intended in effect to alter what I conceive to be the whole current of authority on a point of law which was never argued before them.

Counsel for the plaintiff has relied strongly on the observations of Lord Wright in that case, particularly the following passage[22]: "It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by Lord Blackburn in another connexion in *Dalton* v. *Angus*[23] . . . Lord Blackburn again enunciated the same principle in *Hughes* v. *Percival*.[24] More recently this House again, in a different context of fact, applied this rule in *Wilsons & Clyde Coal Co. Ltd.* v. *English*."[25] These observations, although obiter, necessarily carry the greatest weight. Nevertheless, as I have ventured to observe, *Dalton* v. *Angus* [26] was not a case where the claim was in negligence, and *Hughes* v. *Percival* [27] falls into a very special category to which the present case and *Haseldine* v. *Daw & Son Ltd.*[28] do not belong; *Wilsons & Clyde Coal Co. Ltd.* v. *English* [29] was a case of master and servant. With great diffidence, I doubt whether it is helpful to import into this branch of the law the conception of warranty. That seems to me to belong exclusively to the law of contract. The obligation of an invitor to an invitee has nothing to do with the law of contract or quasi-contract, but is part of the law of tort. The invitee's cause of action lies in negligence and nothing else. The only obligation of the invitor in essence is an obligation imposed by law to take reasonable care and nothing more. In each case the question must be posed: How ought that obligation to be performed? The answer to that question must depend on the particular facts of each case. If, as in the present case and in *Haseldine* v. *Daw & Son Ltd.*,[30] some act is to be performed which calls for special knowledge and experience which the invitor cannot be expected to possess, then. in my judgment, he fulfils his duty of care as a prudent man by employing a qualified and reputable expert to do the act.

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[19] [1945] K.B. 174.

[20] [1952] 2 All E.R. 418.

[21] [1953] 2 All E.R. 1185, 1196.

[22] [1956] 1 W.L.R. 103n., 110.

[23] 6 App.Cas. 740, 829.

[24] 8 App.Cas. 443, 446.

[25] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

In my judgment, it follows that the claim fails against the present defendants. I would add that on the facts as I have found them it would appear that there could have been no answer to the claim had it been brought against Cairns (Newcastle) Ltd.*

Judgment for the defendants.

Solicitors: *Gibson, Pybus & Reay-Smith, Newcastle-upon-Tyne; R. H. Eggar, St. Helens.*

[26] 6 App.Cas. 740.

[27] 8 App.Cas. 443.

[28] [1941] 2 K.B. 343.

[29] [1938] A.C. 57.

[30] [1941] 2 K.B. 343.

* *Note*: Since it might appear from the last paragraph of the judgment that the plaintiff had been advised to proceed against the wrong party, it should be pointed out that junior counsel who appeared for the plaintiff neither settled the pleadings nor was called on to advise.

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June 17.

Lord Goddard C.J., Parker L.J. and Lloyd-Jacob J.

UNIVERSAL CARGO CARRIERS CORPORATION *v.* CITATI (No. 2).

Arbitration—Special case—Findings of fact—Inference of fact—Power of court to draw—Relevant facts found by arbitrator—Inferences of fact not drawn by arbitrator—R.S.C., Ord. 34, *rr.* 1, 7.

The court has power under R.S.C., Ord. 34, r. 1,[1] to draw inferences of fact from facts found in a special case (including a special case stated on an award made by an arbitrator under section 21 of the Arbitration Act, 1950, for that is a "matter" within rule 7 of Order 34 [1]), provided that such inferences do not conflict with the facts found or inferred by the tribunal of fact.

Williams v. *Manisselian Frères* (1923) 17 Ll.L.Rep. 72 applied.

Where, therefore, a judge, on hearing a special case stated on an award stated by an arbitrator under section 21 of the Arbitration Act, 1950, declined to find a fact which, although it was not found in the case, was an irresistible inference from the facts found, and remitted the case to the arbitrator for a further finding of fact, the judge was in error.

Per Parker L.J. The power to draw inferences must not be used as a convenient method of avoiding the necessity of remitting to an arbitrator. If there is any conceivable doubt as to what the arbitrator would find or what inference he would draw, then the matter must be remitted; but if the inference is irresistible the court can draw its own inference.

Decision of Devlin J. [1957] 2 Q.B. 401; [1957] 2 All E.R. 70 reversed.

APPEAL from Devlin J.[2]

By a charterparty dated June 30, 1951, shipowners, Universal Cargo Carriers Corporation, chartered their steamship *Catherine M. Goulandris* to Pedro Citati, to proceed to Basrah and there load a cargo of scrap iron for carriage to Buenos Aires. The vessel arrived at Basrah on July 12, but as there was no cargo ready, no effective shipper nominated, and, accordingly, no loading berth, she remained at the buoys. The lay days were due to expire on July 21, and on July 18, the shipowners, finding that no cargo was yet available or was likely to be available, cancelled the charter, rechartered the vessel to other charterers at a lower rate of freight, and on July 23 the vessel sailed for Bombay to load under the new charter. On July 24 the charterer obtained an injunction in New York against the shipowners, but it was discharged by consent on July 27; and the shipowners, without prejudice to their rights, granted the charterer an option, to be exercised before midnight on August 15–16, 1951, to charter a substitute vessel from them on the same terms. No cargo, however, became available and the option was never exercised.

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[1] R.S.C., Ord. 34, r. 1: "The "parties to any cause or matter may "concur in stating the questions of "law arising therein in the form of "a special case for the opinion of the "court. Every such special case "shall be divided into paragraphs "numbered consecutively, and shall "concisely state such facts and "documents as may be necessary to "enable the court to decide the ques-"tions raised thereby . . . and the "court shall be at liberty to draw "from the facts and documents "stated in any such special case any "inference, whether of fact or law, "which might have been drawn there-"from if proved at a trial."

R. 7: "This Order shall apply to "every special case stated in a cause "or matter, or in any proceeding "incidental thereto."

[2] [1957] 2 Q.B. 401; [1957] 2 All E.R. 70.

Thereafter, arbitration proceedings were started, the shipowners claiming damages exceeding $100,000, representing the difference in freight rates, and the charterer counterclaiming for repayment of advance freight, the point in issue being whether the shipowners had been entitled on July 18 to cancel the charter.

The owners by their pleadings raised two contentions: (1) that the charterer had shown by his conduct that he did not intend to perform the contract, and that he had committed an anticipatory breach thereof; and (2)—by a later amendment to the points of claim, made before the arbitration began—that the charterer was unable and unwilling at any material time to perform the charterparty, in that when the ship left Basrah it had become clear that no scrap iron was or would ever be available.

The hearing before the arbitrator (Mr. Eustace W. Roskill Q.C.) did not take place until February, 1956, and lasted four days. At the request of the shipowners the arbitrator stated his interim award on liability in the form of a special case, set out at considerable length. He found that the charterer had committed an anticipatory breach of the charterparty, which the owners were entitled to and did treat as repudiation of the charterparty.

By paragraph 33 of the special case the arbitrator made the following further findings of fact: "(1) On July 18, 1951, there was "no person or shipper in Basrah or elsewhere in Iraq who was "prepared to ship any scrap iron on board the vessel, but the "respondent" [the charterer] "was not aware that this was "so; (2) the only person in Iraq who had scrap iron in his posses-"sion or control which could have been used for shipment on "board the vessel was Vassos, and the respondent by July 18, "1951, was aware that this was so; (3) on July 18, 1951, Vassos "was not prepared to ship any scrap iron on board the vessel: "the respondent on July 18, 1951, was aware that Vassos had "refused so to ship but then hoped that Vassos might relent "and agree thereafter to ship on board the vessel: the respondent was encouraged in this hope by Chbib; (4) Vassos in fact "was not prepared at any time after July 18, 1951, to sell any "scrap iron which he owned or controlled either to the respondent, Haddad or Chbib; but the respondent until about July 23 "or 24, 1951, continued to hope, and was encouraged by Chbib "to hope, that Vassos might relent and agree to ship on board "the vessel; (5) even if Vassos had relented and agreed to ship "on board the vessel, such shipment on board the vessel on and "after July 18, 1951, could only have taken place if the claimants "had been prepared to break the fresh charterparty into which "they had entered on July 18, 1951; there was no evidence "before me from which I can find or infer that the claimants "would have been prepared to do this; (6) even if Vassos had "relented and agreed to ship, such agreement would in all "probability have been conditional upon Vassos receiving a "greatly enhanced price which, together with the freight payable "under the charterparty, would have exceeded the $375,000 for "which the respondent held permission to open and had opened "the letter of credit: I do not think it would necessarily have "been impossible for the respondent to make fresh arrangements "regarding payment both for the goods and for freight, but at "best it would have taken a very considerable time indeed for "such fresh arrangements to have been made; (7) the respondent on July 18, 1951, was not able to perform the charterparty; "(8) the respondent on July 18, 1951, was willing to perform the "charterparty if and when cargo became available to load on the "vessel."

The question of law stated for the opinion of the court, namely, whether the shipowners were entitled on July 18, 1951, to treat the charterparty as discharged by the charterer's breach, and to claim damages accordingly, came before Devlin J. in February, 1957. The hearing lasted six days, and counsel for the shipowners submitted, on their second contention as to frustration, that the cumulative effect of the facts found by the arbitrator showed inability to perform on the part of the charterer, but that even if there were no such actual finding, the court had power under R.S.C., Ord. 34, r. 1, to draw such an inference of fact from the facts found in the case.[3] If, however, the court's view was that there was no such power, counsel asked the court to exercise its power under section 22 of the Arbitration Act, 1950, and remit the case to the arbitrator for a further finding of fact on the issue of inability. As that application for remission was out of time, Devlin J. granted it and extended the time only on an undertaking by the shipowners to pay the costs of the remission, unless the court otherwise directed. The order for remission was made on March 12, 1957,[4] at the conclusion of an opinion delivered by the judge in favour of the charterer on the substantive issue of law as to anticipatory breach.

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[3] [1957] 2 Q.B. 401, 419.

On the issue of inability, the judge said that if the shipowners could establish it on the facts found, they were entitled to succeed; but though the findings of fact in the award contained much material from which such an inference might be made, that inference had not been drawn; and that it was well settled that the court itself was not permitted to draw inferences of fact from facts found by an arbitrator.[5] His Lordship said that the reason why there was no conclusive finding on this point was because it had not been raised before the arbitrator; and that the shipowners were at fault in not having required the arbitrator to find the necessary facts. In making the order that the case be remitted for the arbitrator to answer the question "whether on July 18, "1951, the charterer was willing and able to perform the charter-"party within such time as would not have frustrated the "commercial object of the adventure," his Lordship said that in any event the shipowners must pay the whole costs of the hearing of the special case incurred to date and any costs which might be further incurred as a result of the remission.

The charterer appealed against the order for remission, but the Court of Appeal, on July 25, 1957,[6] upheld the judge's order, and intimated that in their view the point as to inability had been raised on the pleadings before the arbitrator in such form as to have enabled him to make the necessary findings. The question whether the court itself had power to draw inferences of fact from the facts found in the special case was left open.

On October 4, the arbitrator made a further finding of fact in favour of the shipowners; and the case again came before Devlin J. on October 14, 1957, for final judgment, which was in favour of the shipowners.

The judge was then for the first time referred, by counsel for the shipowners, on the issue as to costs, to the decision of the Court of Appeal in *Williams* v. *Manisselian Frères* [7] as authority for the submission that the court had power to draw inferences of fact from facts found on a special case stated by an arbitrator; and it was submitted that as the judge could have drawn such inferences from this special case and could thereby have avoided the remission, the order for costs of the hearing and of the remission should follow the event and should now be made in favour of the successful shipowners. The judge declined to alter his order as to costs. He said that if the fact found on the remission had been in the case from the beginning the argument before him would have been considerably shortened; that it was the business of a judge to try to save the costs of the parties by shortening matters; and he continued: "The factor that operated on my "mind at the time and operates on it now is that . . . it is the "business of the party who raises a question of law or wishes "to advance a contention of law on the hearing of a case "stated, to see when he gets the award that the facts set out in "it are sufficient to enable him to do so. If they are not, then "he ought to apply at once. . . . Where, as here, the issues are "complicated, and where, as here, the parties have narrowed "the matter down by argument, and are invited by the arbitrator "(as I think they were here) to set out the findings of fact that "they want, it is not, in my judgment, sufficient for one party "to say that there was an issue raised on the pleadings. I do "not think that it is part of the duty of an arbitrator . . . to go "back through the pleadings to see whether there are any points "which have not been expressly and in terms abandoned which "raise issues which were not left to him, or apparently not left "to him, for a finding of fact thereon, and to extend the award "by findings of fact on them. . . ."

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[4] [1957] 2 Q.B. 401, 455.

[5] Ibid. 427.

[6] [1957] 1 W.L.R. 979; [1957] 3 All E.R. 234.

[7] (1923) 17 Ll.L.Rep. 72.

The judge declined to alter his reserved opinion of March 12, 1957, in the light of the Court of Appeal decision, and said that the best course on costs would be to allow his original order to stand, namely, that the successful owners should pay the costs of the hearing and of the remission; but he gave leave to appeal against that order. His Lordship also declined to alter his opinion on the question whether the court had power to draw inferences of fact from facts found by an arbitrator in a special case, but asked that if that point were not taken to the Court of Appeal he should be informed in order that a note could be put into the report of his judgment in the Law Reports, pointing out, for the convenience of practitioners, that *Williams* v. *Manisselian Frères* [7] had not been considered before him.

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[7] 17 Ll.L.Rep. 72.

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The shipowners appealed with leave against the order as to costs, and the charterer cross-appealed. An appeal by the charterer and a cross-appeal by the shipowners on the substantive issues were also set down; but at the hearing the charterer was not represented, and did not appear, and his cross-appeal on costs and the appeal and cross-appeal on the substantive issues were accordingly struck out.

Ashton Roskill Q.C. and *Henry V. Brandon* for the shipowners. First, the judge, in exercising his discretion as to costs and imposing this penal order on the owners, misdirected himself in holding that the point as to inability had not been raised before the arbitrator or had been raised at the 11th hour. He ought to have altered his original order in the light of the decision of the Court of Appeal (on July 25, 1957),[8] that that point had been raised in time and was not a new point raised for the first time on the hearing before him.

Secondly, the judge was wrong in holding that he had no power to draw inferences of fact from the facts clearly found in the special case stated by the arbitrator. In *Williams* v. *Manisselian Frères*,[9] which in this connexion is not mentioned in any textbook and is not referred to in the Annual Practice in the notes to R.S.C., Ord. 34, r. 1, Scrutton L.J. drew such inferences from an award stated by an umpire on an arbitration and said that R.S.C., Ord. 34, r. 1 (which at that date was in the same terms as the rule appearing in the Annual Practice for 1958, vol. I, at p. 771), empowered the court to draw such inferences. The words "cause" and "matter" are defined in section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and a special case stated by an arbitrator under section 21 of the Arbitration Act, 1950, is a "matter" within that definition.

[LORD GODDARD C.J. But a special case stated under the Arbitration Act, 1950, does not come within Order 34, for the parties to such a special case do not "concur" or agree the facts. Indeed, if one party asks the arbitrator to state a special case, the other side hotly contests it.]

The parties here elected to go to arbitration, and the mere fact that they have submitted their dispute to arbitration involves concurrence.

[LORD GODDARD C.J. That is rather a refined interpretation.]

[PARKER L.J. Rule 7 of Order 34 is of some assistance.]

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[8] [1957] 1 W.L.R. 979.

[9] 17 Ll.L.Rep. 72.

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Yes. It shows that such a special case is a "matter" within rule 1. The cases cited to Devlin J. decided only that the court cannot contradict an inference drawn by an arbitrator and substitute its own inference. That is the ratio of *Strathlorne S.S. Co.* v. *Andrew Weir & Co.*,[10] on which Devlin J. placed especial reliance. [*Nello Simoni* v. *A/S M/S Straum*[11]; *Royal Greek Government* v. *Minister of Transport (No. 2)*[12]; *North-Western Cachar Tea Co. Ltd.* v. *British & Benningtons Ltd.*,[13] and *Produce Brokers Co.* v. *Weiss & Co.*[14] were also referred to on this point.] *Barclay* v. *Pearson*[15] does not assist, for it was not concerned with an arbitration.

The court has power to draw inferences only if the inference is irresistible, as it is here. If there is any real doubt on the findings of fact as they stand, it is conceded that the case must be remitted.

[Parker L.J. Even where express power is given to draw inferences, as on a case stated by quarter sessions, it has always been held that the court cannot interfere with such inferences but can only supplement. Is it necessary to rely on R.S.C., Ord. 34? Cannot the court exercising its own inherent jurisdiction construe this document?]

Either inherently as a matter of construction, or specifically as a result of the power conferred by the statutory rule, the court could and should have drawn the only possible inference, on the facts here found by the arbitrator, in favour of the shipowners. The judge erred in law in thinking that it was well settled that he had no such power. It is very desirable that the court should have this power, particularly in heavy commercial arbitrations, because of the difficulties which may arise from the divorce of the tribunals of law and of fact. If it is right that the judge could and should have drawn this inference, the successful owners are entitled to the costs both of the hearing of the special case and of the unnecessary remission.

Lord Goddard C.J. said that this appeal had come down entirely to a question of costs, though it arose in a somewhat complicated case, which had been before the courts on a number of occasions.

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[10] (1934) 40 Com.Cas. 168; 50 Ll. L.Rep. 185.

[11] (1949) 83 Ll.L.Rep. 157.

[12] (1949) 66 T.L.R. (Pt. 1) 504; 83 Ll.L.Rep. 228.

[13] (1921) 10 Ll.L.Rep. 381.

[14] (1918) 87 L.J.K.B. 472.

[15] [1893] 2 Ch. 154.

[His Lordship stated the facts and the two contentions of law put forward by the shipowners on the arbitration. He continued:] The arbitrator made an award of very considerable length. It may be that if the award had not been as long as it was, some of the trouble might not have arisen, for though I am not criticizing the award, it was very lengthy, and I think it takes a good deal of following. At any rate, the arbitrator held that there had been an anticipatory breach. [His Lordship stated the arbitrator's findings of fact in paragraph 33 of the case stated, and continued:] It was not stated in so many words that the arbitrator so found, but the owners contended that that paragraph amounted to a finding that impossibility had occurred which frustrated the adventure.

[His Lordship then stated the history of the subsequent proceedings before Devlin J. and the Court of Appeal set out above, and continued:] The matter was remitted to the arbitrator. The arbitrator found—and it was quite obvious that he could not have done otherwise—that impossibility had occurred. And, indeed, I think from reading this award, with all respect to the judge, that the arbitrator had all along intended to find that impossibility had occurred. If one reads paragraph 33 of the award, it will be seen that, from the facts which the arbitrator found clearly enough—although he said that "in his view" certain things had occurred—the arbitrator had always taken the view that by July 18, 1951, there was no scrap iron that could be shipped from Basrah. That is what it comes to.

Now the shipowners, having succeeded in the arbitration, have appealed to this court, by leave of the judge, because the judge, in giving his final decision in their favour, adhered to his view with regard to the costs, namely, that they had to pay the whole of the costs; but he did give leave to appeal. In my opinion, this court cannot support the order of the judge with regard to the costs.

Two points have been taken by Mr. Roskill. The first point was that, on reconsideration, especially if the reasons which had influenced the Court of Appeal were taken into account, the judge should not have made the order that he did. The second point was that the judge was wrong in his view that he had no power to draw an inference of fact. If he had considered that he had that power, he would have drawn the inference of fact and found in exactly the same way as the arbitrator found; and, therefore, there would have been no need to remit the case to the arbitrator. Mr. Roskill so contended before the judge; but the

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judge made him pay the costs because he applied to remit and he was out of time. The judge said that, as he was applying for an indulgence, he ought to pay all the costs; and Mr. Roskill maintains that the judge was wrong and that he ought to have drawn the inference for himself.

That second contention of Mr. Roskill raises a point of some importance, and I propose to base my decision on that. That relieves me of the necessity of having to consider the question whether or not an appeal would lie on the other ground, since it might be said that that was entirely a matter of discretion for the judge.

I have already pointed out that the arbitrator in paragraph 33 of the stated case found certain facts, from which the judge could and would have drawn the inference that it was impossible to ship the cargo within the material time, if he had thought he had power to do so.

The judge, however, said that it was well settled that he had no power to draw inferences of fact which had not been drawn by the arbitrator. In so saying, he did not cite any authority for that proposition; he laid it down as an indisputable fact. With all respect to the judge, I think he was wrong on that point. No case has ever laid that down; and the cases which were cited to, and no doubt considered by, the judge really turned on a different point, namely, that if an arbitrator has drawn an inference of fact from the matters before him, it is not open to the court on a special case to disregard the fact which the arbitrator has inferred and substitute for it a fact which the court has inferred, because that would be differing from the arbitrator's finding of fact. The law is perfectly clear that all facts are for the arbitrator and not for the court.

If, therefore, the arbitrator has found a fact by inference, it is not open to the court by inference to find the contrary fact; but it has never been held in any of the cases to which reference has been made that the court cannot draw an inference of fact if there is what I may call a hiatus; that is to say, where some fact ought to have been found which has not been found, but which the court can see, from the facts which have been found, must be inferred. Indeed, there is authority directly in point, which, curiously enough, is not mentioned in any textbook, but which the industry of Mr. Roskill has found, in *Williams* v. *Manisselian Frères.*[1] In that case Scrutton L.J. drew inferences of fact; he pointed out in his judgment that there was a missing fact and that, although the case had been sent back to an arbitrator, there was still a missing fact; and he proceeded to draw an inference which supplied that omission. He said: " For this " reason "—because something had not been found—" we asked " the arbitrator to say whether the shortage which he found was " commercially substantial, but for some reason or another he " did not answer the question, and his recent and lamented " death prevents us from asking the question now. This court " has power under R.S.C., Ord. 34, r. 1, to draw inferences of " fact from the facts stated; and I draw the inference that to " ship 2,578 tons at the Danube ports, out of a total final cargo " of 5,225 tons, is commercially to ship half the cargo."

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[1] (1923) 17 Ll.L.Rep. 72.

That constitutes clear authority that, in the opinion of the Court of Appeal, the court has power to draw inferences of fact, provided, of course, that it does not draw an inference of fact which is in conflict with a fact found, whether by inference or not, by the arbitrator.

Scrutton L.J. in that case referred to and relied on Order 34 of the Rules of the Supreme Court, and rule 1 of that Order provides: " The parties to any cause or matter may concur in " stating the questions of law arising therein in the form of a " special case for the opinion of the court. Every such special " case shall be divided into paragraphs numbered consecutively, " and shall concisely state such facts and documents as may be " necessary to enable the court to decide the questions raised " thereby." Then, after certain provisions, it states " and the " court shall be at liberty to draw from the facts and documents " stated in any such special case any inference, whether of fact " or law, which might have been drawn therefrom if proved at a " trial."

When Mr. Roskill first showed that Order to us, I had some doubt as to whether that would apply to a special case stated under the Arbitration Act, 1950, because a case stated under section 21 of the Arbitration Act is a case stated by an arbitrator; it is not a case which any parties to a cause or matter have concurred in stating. But rule 7 of Order 34 states: " This Order " shall apply to every special case stated in a cause or matter, " or in any proceeding incidental thereto." Of course, an arbitration is a " matter " and, therefore, it seems clear that the Order does apply to a case stated under the Arbitration Act as well as to a case stated by agreement between the parties; and there is, as I have said, the direct authority of the Court of Appeal in *Williams* v. *Manisselian Frères* [1] that the court has power to draw an inference.

It seems to me, therefore, that the result of all this is that the judge, in declining to draw the inference which he might have drawn, and in thinking that it was necessary to remit the case to the arbitrator for him to find the fact or draw the inference, was in error, and I cannot agree with him. I think that he had power to draw, and should have drawn the inference, because, as I have said, it is quite clear that, if he had considered that he had such power, he would have drawn the inference that there was impossibility here. It was the only inference which could be drawn and, I think, in more than one place in his judgment, the judge was of the opinion that that was the only conclusion which he could have come to.

In these circumstances, the reasons which the judge gave for ordering the successful claimants to pay all the costs go. There was no necessity to remit this case to the arbitrator; there was no necessity for the shipowners to have taken steps within six weeks or any particular time to get the case remitted to the arbitrator. There were plenty of facts found in the case to enable the court to draw the inference, if necessary. Speaking for myself, I think that the arbitrator had found enough facts to make it unnecessary to draw any inference.

Be that as it may, I am clearly of the opinion that the case need never have been referred back to the arbitrator, and it is unfortunate that all these proceedings and expenses have been incurred. The reason on which the judge based his order with regard to the costs has been shown to be erroneous. Accordingly, it should be set aside; the costs must follow the event and, therefore, the shipowners are entitled to costs.

Parker L.J. I so entirely agree with everything that my Lord has said that I only desire to add one word as a word of caution. This power to draw inferences, in my judgment, undoubtedly exists; but, as my Lord has said, it must not be used to interfere with an inference drawn by the arbitrator in the sense of substituting the court's inference for that of the arbitrator. Also it must not be used as a convenient method of avoiding the

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[1] 17 Ll.L.Rep. 72.

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necessity of remitting to an arbitrator. If there is any conceivable doubt as to what the arbitrator would find or what inference he would draw, then the matter must be remitted; but if, as I think is the case here, the inference is irresistible, then the court can draw its own inference. Accordingly, I would allow this appeal.

LLOYD-JACOB J. I agree.

Appeal allowed.

Solicitors: *Constant & Constant.*

M. M. H.

WELLS *v.* COOPER.

[1955 W. No. 74.]

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Apr. 23, 24;
May 5.

Jenkins, Parker and Pearce L.JJ.

Negligence—Standard of care—Do it yourself repairs—Injury to invitee from insecure door handle—Handle fixed by occupier—Degree of care and skill required of householder doing home repairs.
Licensor and Licensee—Invitee or licensee—Duty of occupier.

The plaintiff, a fishmonger, when delivering some fish at the house of the defendant, was invited to come inside and take a cup of tea. When leaving he pulled the back door to; the handle came off in his hand, and he fell about four feet from an unrailed platform and sustained injury. The door was naturally stiff, and was rendered more so by a strong wind.

The handle in question had been fixed by the defendant, an amateur carpenter of some experience, some months before. The handle came away because the anchorage afforded by the three-quarter inch screws fixing it was not strong enough to withstand the force of the pull which the plaintiff found it necessary to exert. The defendant had believed the screws to be adequate for the purpose of fixing the handle. In an action for damages for personal injuries, it was contended for the plaintiff that the screws used by the defendant were too small, and that one inch screws should have been used. The plaintiff claimed damages from the defendant on the grounds (1) that he was in breach of his duty as invitor to the plaintiff as invitee; (2) that irrespective of that relationship the defendant, in carrying out the work of fixing the handle himself, assumed a duty towards the plaintiff as a lawful visitor to the house to take reasonable care to protect him against any danger created by the insecurity of the handle. Stable J. dismissed the action. On appeal:—

Held, dismissing the appeal, (1) that on either ground of action the duty owed by the defendant to the plaintiff was a duty to take reasonable care for his safety.

(2) That, in the case of such a trifling domestic replacement, a man of the defendant's experience was justified in undertaking it himself.

(3) That the degree of care and skill required of a householder undertaking his own repairs was to be measured not by reference to his own degree of personal competence, but by reference to the degree of care and skill which a reasonably skilled carpenter might be expected to apply to the work in question.

(4) That, since the defendant, a reasonably competent carpenter, was doing his best to make the handle secure, he must be taken to have discharged his duty of care unless his belief that three-quarter inch screws would be adequate was one which no reasonably competent carpenter could reasonably entertain, and the evidence failed to establish that.

Per curiam. The decision did not mean that the degree of skill and care required of an invitor such as the defendant was to be measured by the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which was of a higher standard.

APPEAL from Stable J., sitting at Sussex Assizes.

The plaintiff in the action, Albert Ernest Wells, appealed from a judgment of Stable J. dated July 18, 1957, dismissing his claim against the defendant, Frederick Albert Cooper, for damages for personal injuries sustained by the plaintiff when leaving the defendant's house by the back door. The defendant's house, of which he was owner-occupier, was known as "Hazelgarth," Friars Hill, Guestling, near Hastings. The plaintiff was a fishmonger who had been for some time in the habit of calling at the defendant's house for orders twice weekly. He made one of these customary calls on December 4, 1954, was given an order, went to fetch it from his van, came back with it to the defendant's kitchen, and was then invited to stay for a cup of tea. Having had his tea, he was making his way out by the back door when the handle on which he was pulling to shut the door after him came away in his hand, with the result that he lost his balance, fell to the ground from a raised concrete platform immediately outside the door, and was injured. The question was whether, on the facts of the case, the defendant should have been held liable to the plaintiff for this mishap.

The concrete platform on which the door opened was reached from the ground by a flight of steps built against the wall of the house to one side of the door, and was 4 ft. 6 in. in length measured outwards from the door, by 3 ft. 6 in. in width. It was raised 4 ft. 1 in. from the ground, and not provided with any railing or fence. The door, which opened inwards, was divided vertically into two leaves after the manner of a stable door. The handle to which this case related was attached to the bottom corner of the upper leaf, which overlapped the top edge of the lower leaf on the inside, so that in the process of closing the door the upper leaf drew the lower one along with it. The door was at the material time fitted with an "atomic strip" which made it more difficult to close than it would otherwise have been, and a fairly stiff pull was necessary to shut it properly. On the day of the accident a very strong wind was blowing against the door which made it even stiffer than usual.

The handle in use at the time of the accident had been attached to the door some four or five months previously by the defendant himself, to replace a bakelite handle which the defendant had decided to discard after a similar bakelite handle on a neighbour's door had broken in his hand. This new handle was made of metal and was of the lever type, mounted in a metal plate attached to the door by four screws inserted through holes, one at each corner of the plate, and screwed into the woodwork of the door. The screws used by the defendant for this purpose were three-quarter inch screws.

It was not in dispute that the handle came away in the plaintiff's hand because the anchorage afforded by these screws was not strong enough to withstand the force of the pull which the plaintiff found it necessary to exert on the handle in order to shut the door after him.

The defendant was an amateur carpenter of some experience, well accustomed to doing small jobs of replacement and repair about his house, and he believed that his fixing of the new handle was perfectly secure, and that he was making a decided improvement on the former bakelite handle. The adequacy of his work was to all appearance proved by the fact that during the four or five months which had elapsed between the fixing of the new handle and the time of the accident the new handle had been in constant use without showing any signs of looseness or insecurity.

Stable J. held that the accident was not one which the defendant could reasonably have foreseen, and dismissed the action. The plaintiff appealed.

Alan Fletcher for the plaintiff. The defendant owed to the plaintiff the duty of care applicable to an invitor, and also the duty of care owed by a person who does work on premises to those likely to use them, as in *A. C. Billings & Sons Ltd.* v. *Riden.*[1] The questions are: (1) ought the defendant to have foreseen that, if the handle came off, someone might well suffer an injury, and (2), if yes, ought he to have realized that the screws were not of adequate length?

On the first question the standard of care is that of the ordinary reasonable man. The defendant could reasonably have foreseen that, if the handle came off, there was a risk of accident, and it is not necessary that he should have foreseen the particular damage which actually occurred: see *Bolton* v. *Stone*[2] and *Thurogood* v. *Van den Bergs & Jurgens Ltd.*[3] The fact that the defendant replaced the bakelite handle by a metal one showed that he anticipated danger if the handle broke.

On the second question the standard of care owed by an invitor to an invitee is shown by *Haseldine* v. *C. A. Daw & Son Ltd.*[4] It is not contested that an objective test should be applied; the issue is whether the standard of skill and care required is less than that of a skilled carpenter, and *Jones* v. *Bird*[5] shows that the standard is that of a skilled person. An occupier must show the skill of a skilled carpenter if he does jobs about his house which may cause danger if badly done. It is shown by *Thomson* v. *Cremin*[6] that an occupier is liable for the negligence of a skilled carpenter whom he employs, and it would be absurd if he escaped liability when he made the same mistake himself.

Both as invitor, and as a person doing work on premises as in *A. C. Billings & Sons Ltd.* v. *Riden,*[7] the defendant was required to exercise the skill of a skilled carpenter. Such a man would know that three-quarter inch screws were not long enough, and would reasonably anticipate that their use might lead to an accident.

T. Springer for the defendant. The real question in this case is, what is the standard of care required? It must depend on the nature of the work to be done; when the repair is done to a complicated piece of machinery like a lift, which is highly dangerous when out of order, a very high standard of workmanship is required, as in *Haseldine* v. *C. A. Daw & Son Ltd.*,[8] but a very different standard is required when a householder carries out a small job in his own house. This was plainly a job which a reasonably competent householder such as the defendant could do without calling in an expert. [*Blyth* v. *Birmingham Waterworks Co.*[9] was referred to.]

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[1] [1958] A.C. 240; [1957] 3 All E.R. 1.

[2] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[3] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[4] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[5] (1822) 5 B. & Ald. 837, 845.

[6] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[7] [1958] A.C. 240.

It is the same duty, whether the householder or a hired carpenter does the work; an invitor's duty of care is not enlarged when he employs a carpenter. In the case of a job which can only be done by an expert the standard is that of an expert, but in a case where an ordinary householder is competent to do the job the standard is that of the ordinary householder.

If this had been the handle of an inner door, no one would ever have suggested that it called for the employment of a skilled carpenter. It was quite open to the judge to conclude that no reasonable person could have anticipated an accident such as this, and such a finding is not one with which the Court of Appeal ought to interfere.

The standard of duty is not related to the person who carries out the task, but to the task itself; it is variable and a question of degree: see *Bourhill* v. *Young*.[10] The question whether an expert was required for the job, or whether it could be carried out by the occupier, was essentially one for the judge of fact. There is a difference between the degrees of skill required of a householder doing his own jobs and of a professional carpenter working for reward. [*Staveley Iron and Chemical Co. Ltd.* v. *Jones* [11] was also referred to.]

Fletcher in reply. Certain of the principles applicable may be found in Clerk & Lindsell on Torts, 11th ed., p. 359. In contract there may be more than one standard, according to the terms of the contract. But in tort there is only one standard, that of the skilled carpenter doing a job on his own premises. As an invitor, the defendant warranted that due care and skill had been exercised to make the premises reasonably safe: see *per* Lord Wright in *Thomson* v. *Cremin*.[12]

Cur. adv. vult.

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[8] [1941] 2 K.B. 343.

[9] (1856) 11 Ex. 781.

[10] [1943] A.C. 92; [1942] 2 All E.R. 396.

[11] [1956] A.C. 627; [1956] 1 All E.R. 403.

[12] [1956] 1 W.L.R. 103n., 110.

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May 5. Jenkins L.J. The judgment which I am about to read is the judgment of the court in this case. [His Lordship stated the facts and continued:]

The relationship subsisting between the defendant and the plaintiff at the time of the accident was admittedly that of invitor and invitee. In these circumstances it is sought to make the defendant liable for the accident on two grounds. First, it is said that the defendant was in breach of his duty as invitor to the plaintiff as invitee. The insecure handle was an unusual danger of which the defendant knew or ought to have known and against which he should consequently have taken reasonable care to guard the plaintiff. Secondly, it is said that in carrying out the work of fixing the handle himself the defendant, irrespective of the invitor-invitee relationship, assumed a duty towards the plaintiff as a lawful visitor to the house to take reasonable care to protect him against any danger created by the insecurity of the handle. See *Riden* v. *A. C. Billings & Sons Ltd.*,[1] Court of Appeal, and in the House of Lords.[2]

We should have thought that in the circumstances of this case the first of these two possible grounds of liability is the more appropriate. But in truth there is little difference between them for the present purpose. Either way the duty owed by the defendant to the plaintiff was a duty to take reasonable care for his safety, and the question is whether on the facts of this case the defendant did take reasonable care to that end.

Mr. Fletcher, for the plaintiff, formulates the issues (in effect) in this way: First, ought the defendant to have foreseen that if the handle came away when a person pulled it to shut the door as the plaintiff did, that person might suffer injury; and, secondly, if so, ought the defendant to have known that the screws which he used were not adequate to fix the handle to the door firmly enough to prevent any likelihood of such an occurrence?

We think that if the defendant had envisaged the possibility of the handle coming off in the hand of a person pulling on it, he could hardly have failed to appreciate the likelihood of untoward consequences such as did in fact occur; and accordingly Mr. Fletcher's second issue appears to us to be the substantial issue in the case. It involves consideration of the standard of care to be demanded of the defendant in relation to the fixing of the handle.

[1] [1957] 1 Q.B. 46.

[2] Sub nom. *A. C. Billings & Sons Ltd.* v. *Riden* [1958] A.C. 240; [1957] 3 All E.R. 1.

As above related, the defendant did the work himself. We do not think the mere fact that he did it himself instead of employing a professional carpenter to do it constituted a breach of his duty of care. No doubt some kinds of work involve such highly specialized skill and knowledge, and create such serious dangers if not properly done, that an ordinary occupier owing a duty of care to others in regard to the safety of premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him. See *Haseldine* v. *C. A. Daw & Son Ltd.*, *per* Scott L.J.[3] But the work here in question was not of that order. It was a trifling domestic replacement well within the competence of a householder accustomed to doing small carpentering jobs about his home, and of a kind which must be done every day by hundreds of householders up and down the country.

Accordingly, we think that the defendant did nothing unreasonable in undertaking the work himself. But it behoved him, if he was to discharge his duty of care to persons such as the plaintiff, to do the work with reasonable care and skill, and we think the degree of care and skill required of him must be measured not by reference to the degree of competence in such matters which he personally happened to possess, but by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question. Otherwise, the extent of the protection that an invitee could claim in relation to work done by the invitor himself would vary according to the capacity of the invitor, who could free himself from liability merely by showing that he had done the best of which he was capable, however good, bad or indifferent that best might be.

Accordingly, we think the standard of care and skill to be demanded of the defendant in order to discharge his duty of care to the plaintiff in the fixing of the new handle in the present case must be the degree of care and skill to be expected of a reasonably competent carpenter doing the work in question. This does not mean that the degree of care and skill required is to be measured by reference to the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which would, in our view, set the standard too high. The question is simply what steps would a reasonably competent carpenter wishing to fix a handle such as this securely to a door such as this have taken with a view to achieving that object.

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[3] [1941] 2 K.B. 343, 356.

In fact the only complaint made by the plaintiff in regard to the way in which the defendant fixed the new handle is that three-quarter inch screws were inadequate and that one inch screws should have been used. The question may, therefore, be stated more narrowly as being whether a reasonably competent carpenter fixing this handle would have appreciated that three-quarter inch screws such as those used by the defendant would not be adequate to fix it securely and would accordingly have used one inch screws instead.

The judge saw and heard two expert witnesses called on the plaintiff's side, namely, one Hicks, an architect and surveyor, and one Hall, a builder; and a great deal depends on the value properly attributable to their evidence.

[His Lordship read passages from the evidence and continued:] The evidence of these two witnesses, if accepted at its face value, would plainly support the view that any reasonably competent carpenter would have appreciated that three-quarter inch screws would not be adequate for the purpose in view, though we think that Hicks's evidence is to some extent weakened by his statement to the effect that three-quarter inch screws would be "adequate" but would allow "absolutely no margin "at all" and also by the sweeping character of his statement to the effect that "the reaction of a person of average intelligence— "such as the defendant, who was in the habit of doing household "carpentry—would be that that screw is of insufficient size to "hold this handle onto the door." Hall, more convincingly, confined his evidence to the length of screw that would have been used by himself or by one of the fully skilled carpenters in his employment. But it is, as we think, to some extent weakened by his last answer in examination-in-chief, in which he pointed out (in effect) that the three-quarter inch screws might give a firmer hold on perfectly dry and sound wood such as that used for the experiment than they would on a back door exposed to the weather and therefore possibly containing some moisture. This suggests that the firmness of the handle might depend not simply on the length of the screw but also on a less obvious factor relating to the condition of the wood.

Nevertheless, if the judge was to be taken as having accepted the evidence of these two witnesses (particularly that of Hicks) at its face value, it would be difficult to support his conclusion to the effect that the defendant had discharged his duty of reasonable care. But we do not think that the judge did accept this.

[His Lordship read passages from the judgment and continued:] It follows, if we are right in our understanding of the language used by the judge, that he must be taken to have rejected the evidence of the two experts to the effect that any reasonably competent carpenter would or ought to have foreseen that the three-quarter inch screws would prove inadequate, as being in the nature of wisdom after the event. It was for the judge to assess the value of the expert evidence. He appears to us to have assessed it as valueless for the purpose of establishing that the defendant, if he had exercised reasonable care and skill in the matter, would or ought to have appreciated, at the time when he did the work, that the three-quarter inch screws would prove inadequate; and on that assessment of this evidence we think he was well warranted in dismissing the action.

In relation to a trifling and perfectly simple operation such as the fixing of the new handle we think that the defendant's experience of domestic carpentry is sufficient to justify his inclusion in the category of reasonably competent carpenters. The matter then stands thus. The defendant, a reasonably competent carpenter, used three-quarter inch screws, believing them to be adequate for the purpose of fixing the handle. There is no doubt that he was doing his best to make the handle secure and believed that he had done so. Accordingly, he must be taken to have discharged his duty of reasonable care, unless the belief that three-quarter inch screws would be adequate was one which no reasonably competent carpenter could reasonably entertain, or, in other words, an obvious blunder which should at once have been apparent to him as a reasonably competent carpenter. The evidence adduced on the plaintiff's side failed, in the judge's view, to make that out. He saw and heard the witnesses, and had demonstrated to him the strength of attachment provided by three-quarter inch screws. We see no sufficient reason for differing from his conclusion. Indeed, the fact that the handle remained secure during the period of four or five months between the time it was fixed and the date of the accident, although no doubt in constant use throughout that period, makes it very difficult to accept the view that the inadequacy of the three-quarter inch screws should have been obvious to the defendant at the time when he decided to use them.

Mr. Fletcher argued that if the defendant had employed a professional carpenter as an independent contractor to fix the new handle, and the carpenter had used three-quarter inch screws with the same results, the defendant would have been liable to the

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plaintiff for the carpenter's negligence on the principle enunciated in *Thomson* v. *Cremin*[4] to the effect that the duty of care owed by an invitor to an invitee is personal to the invitor, who cannot escape liability by delegating the performance of his duty of care to an independent contractor. Accordingly, in Mr. Fletcher's submission the defendant must be liable here because it cannot be that the standard of care to be required of an invitor who does the relevant work himself is lower than it would have been if he had employed an independent contractor to do it for him.

We think the fallacy in this argument is that the standard of care is no more than reasonable care, whether an independent contractor is employed or not. The invitor is to take reasonable care and the standard required of him is not raised to anything higher than that by the circumstances that he may choose to employ an independent contractor to do the work for him. As we have said before, it does not follow that because the degree of care and skill exercised by the independent contractor falls short of the standard required of him under his contract with the invitor it also falls short of the standard required of the invitor as between himself and his invitee. The two standards are by no means necessarily the same.

Each case of this kind depends on its own particular facts, to which the broad principle of reasonable care must be applied with common sense. The task of finding the facts and applying the principle to them is eminently a matter for the court of first instance. On the facts of this case, we find it impossible to hold that the judge came to a wrong conclusion, having regard in particular to the view which he took, and was entitled to take, of the expert evidence on the strength of which it was sought, after the event, to show that the defendant knew or ought to have known at the time when he fixed the handle that the three-quarter inch screws were inadequate, notwithstanding that they in fact sufficed to hold the handle securely for the four or five months of constant use which preceded the accident.

Accordingly, we would dismiss this appeal.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co. for Elliott & Gill, Hastings; Berrymans.*

F. R. D.

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[4] [1956] 1 W.L.R. 103n.

GRECH *v.* ODHAMS PRESS LTD. AND ANOTHER. ADDIS *v.* SAME.

[1956 G. No. 1840.]
[1956 A. No. 2020.]

C. A.

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May 5, 6, 7, 22.

Jenkins, Parker and Pearce L.JJ.

Libel and Slander—Libel—Newspaper—Absolute privilege—Statement by witness at criminal trial—One statement false—Comment made in newspaper—Whether plea of fair comment sustainable.

The plaintiff Grech, who had been associated with a business of letting flats for immoral purposes and had been convicted on a charge connected therewith, was convicted on a charge of housebreaking and theft and sentenced to a term of imprisonment. In the same prison the plaintiff Addis, formerly a solicitor, was serving a term of imprisonment for fraud.

While serving his sentence Grech submitted two petitions to the Home Secretary to secure a review of his sentence; in them he made a number of allegations against the police in connexion with what a witness at the hearing of the action described as "vice in "the West End." He also alleged that before his trial a conspiracy had been entered into by his solicitor C., one P., and R., a police inspector (who demanded a bribe), to procure certain false evidence for the defence. In the result R., C. and P. were tried on a charge of conspiracy to defeat the ends of justice, and were convicted and sentenced on November 29, 1955. At the trial Grech stated in evidence that he had been assisted in the preparation of his petitions by a prisoner whom he did not name. P. stated in evidence that Grech had told him "that he was being helped by some solicitor "by the name of Addis or something."

On the day after the trial the defendants published the following words in the "Daily Herald": "All the dirt . . . the jury con-"victed Grech and he was sentenced to three years. There he "brooded over his belief that he had first been framed, then induced "to pay money out for the 'fiddle' and yet gaoled. With the "help of Jasper Addis, an ex-solicitor, one-time man of affairs to "George Dawson—and gaoled for defrauding him—Grech drew up "a petition to the Home Secretary. Into it he put all the dirt he "knew, and as a Maltese running West End flats as brothels he "thought he knew a great deal."

In actions for damages for libel brought by the plaintiffs, the jury found that the words were defamatory; that they were untrue (as had been admitted by the defendants in Addis's case, as he had not helped Grech); that they were not a fair and accurate report of the criminal proceedings, but that they were fair comment on a matter of public interest. Donovan J. entered judgment for the defendants. On appeal:—

Held, (1) that the words complained of could not be fair comment unless the statement on which the comment was based was either true, or else a fair and accurate report of what was said in court.

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(2) That, in Grech's case, the findings of the jury could be reconciled on the supposition that the jury found, on the hypothesis that the words complained of were or might be statements of fact, they were defamatory and untrue, but that those words were comment and fair; and it could not be held that no reasonable jury could have so decided.

(3) But that, in the case of Addis, the words complained of were based on the untrue statement of fact that Addis helped Grech to draw up his petition; and that that statement was not a fair and accurate report of judicial proceedings; accordingly, the defence of fair comment could not be supported in this case.

Per curiam: If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, although the evidence given by the witness is afterwards shown to be false, the statement can be made the subject of fair comment.

Decision of Donovan J. [1958] 1 Q.B. 310; [1957] 3 All E.R. 556 affirmed in part and reversed in part.

Appeal from Donovan J., sitting with a jury.

The plaintiff Joseph Grech had been associated with a business of letting furnished flats for immoral purposes, and in 1954 was convicted on a charge of knowingly permitting prostitution on one of the premises concerned. In July, 1954, the house of one Morrison was broken into by a thief who stole £500 and other property. In the same month Grech was arrested and charged with the theft by Detective-Inspector Robertson of the Metropolitan police (who alleged that a key of Morrison's premises had been found at Grech's flat) and was remanded on bail.

Before his trial a scheme, according to Grech, was concocted by his solicitor Canter, Robertson, and one Page, in accordance with which the lock of Grech's flat was changed for one which Morrison's key would fit, Robertson demanding and receiving a bribe. Notwithstanding this stratagem Grech was in October, 1954, convicted and sentenced to three years' imprisonment, part of which was served in Maidstone prison. In the same prison the plaintiff Jasper Addis, a former solicitor, was serving a sentence of two years' imprisonment for fraud, the person or one of the persons defrauded being a certain George Dawson. While at Maidstone Grech submitted two petitions to the Home Secretary with the object of securing a review of his sentence. In them he mentioned the affair of the key, and made a number of charges accusing certain police officers of demanding bribes in connexion with the brothel-keeping business. These petitions resulted in investigations which led to the trial at the Central Criminal Court of Robertson, Canter and Page, who were convicted on November 29, 1955, on a charge of conspiracy to defeat the ends of justice and sentenced to terms of imprisonment. Grech gave evidence for the prosecution and was not himself prosecuted.

The following day, November 30, 1955, the "Daily Herald" published the following words: "All the dirt. At his trial Grech "said the key was for his flat. And on the order of the court, "Robertson was sent to try it. He reported that it fitted a lock "there, but the jury convicted Grech and he was sentenced to "three years. There he brooded over his belief that he had first "been framed, then induced to pay money out for the 'fiddle' "and yet gaoled. With the help of Jasper Addis, an ex-solicitor, "one-time man of affairs to George Dawson—and gaoled for "defrauding him—Grech drew up a petition to the Home "Secretary. Into it he put all the dirt he knew, and as a Maltese "running West End flats as brothels he thought he knew a great "deal."

The plaintiffs, Grech and Addis, in a consolidated action claimed damages for libel in respect of those words against Odhams Press Ltd. and Daily Herald (1929) Ltd., the printers and publishers of the "Daily Herald." The plaintiffs alleged that by those words the defendants meant that they had made an inaccurate and dishonest report and had gratuitously disclosed to the Home Secretary scandalous allegations against other people in which they had no real belief, and that they had thereby been brought into hatred, contempt and ridicule.

By their defence the defendants admitted publication. In the case of Grech, the defendants alleged that the words formed part of a fair and accurate report of criminal proceedings and were therefore absolutely privileged; alternatively, that they were published bona fide for the information of the public and were therefore privileged; alternatively, that in as far as the words consisted of allegations of fact, they formed part of a fair and accurate report of court proceedings, and in as far as they consisted of expressions of opinion they were fair and impartial comments on a matter of public interest. In the case of Addis, the defendants relied on similar defences based on privilege. Addis had not in fact assisted Grech in the preparation of his petitions.

In the conspiracy trial Grech had stated in evidence that in preparing his petitions he had been assisted by another prisoner, whose name he did not give, in correcting his English. Page stated in evidence that Grech had told him that he had sent a petition to the Home Secretary "and was being helped in prison "by some solicitor by the name of Addis or something." One

Superintendent Hannam, who had conducted the investigations, agreed in evidence at the trial of the action that the matters alleged in the petitions might compendiously be described as "vice in the West End."

At the trial of the action before Donovan J. the following questions were put to the jury and answered as follows in Grech's case: Question (1): Are the words complained of defamatory? A.: Yes. Question (2): If so, are they true? A.: No. Question (3): If not true, are they nevertheless a fair and accurate report of some of the proceedings at the trial of Robertson, Canter and Page? A.: No. Question (4): Alternatively, are they fair comment on a question of public interest? A.: Yes. Question (5), as to damages, received no answer. In Addis's case the questions and answers were the same, except that question (2) was not put as it was admitted that Addis had no connexion with the petitions.

On those answers Donovan J., after argument, gave judgment for the defendants against both plaintiffs who appealed.

Claud Allen for the plaintiff Grech. The finding of the jury on the question of fair comment is inconsistent with their previous findings and cannot stand. The words complained of are statements of fact and the question should not have been left to the jury. Comment can only be fair when it is based on facts which are true, or on a fair and accurate report of proceedings in court, and the jury have negatived both these requirements. The jury found that "dirt" in this context meant discreditable things which were quite extraneous and irrelevant to Grech's petition. They then found that Grech's petition did not contain irrelevant dirt and that the article was not a fair summary of what was said in the judicial proceeding. If the petition did not contain irrelevant dirt it was impossible to say by way of comment that it did contain irrelevant dirt. Comment must be a statement of subjective opinion. It must be a statement of opinion on facts, and in this case the words which were alleged to be comment were also a statement of fact. Only what is said or read in court can be relied on to support such a plea, and the statements in the report complained of do not correspond to the evidence given; there was never any petition in existence in the preparation of which Grech was helped by Addis. The jury's last answer shows that they were actuated by partiality and did not want Grech to win. [Reference was made to *McQuire* v. *Western Morning News Co. Ltd.*[1]; *Merivale* v. *Carson*[2]; *Hunt* v. *Star Newspaper Co. Ltd.*[3]; *Peter Walker & Son Ltd.* v. *Hodgson,*[4] and *Kemsley* v. *Foot.*[5]]

The plaintiff *Addis* in person. I desire to adopt the arguments already presented. The defendants claim to make an untrue statement on the ground that it was made in court. But it was never stated in court as a fact; it was what Page said that Grech had told him, and if the defendants are to be protected they should have indicated that in the report; instead of that, they stated it as a fact and threw in a reference to George Dawson, whose name was never mentioned in court. The observation of Phillimore J. in *Mangena* v. *Wright*[6] that privilege may exist when the allegation is made by one person and the comment by another cannot apply to evidence given in court.

F. H. Lawton Q.C. and *Hugh Davidson* for the defendants. It was open to the jury to find that the report was not fair and accurate but was at the same time fair comment. *Thompson* v. *Truth and Sportsman Ltd.,*[7] a case in the Privy Council, shows that the two defences can be run together; what may not be fair for the purposes of a fair and accurate report may be fair for the purposes of fair comment. Because the defendants failed to establish that the report was fair and accurate, it does not follow that the facts which have to be established as a basis for fair comment do not exist.

The words complained of were capable of being found to be comment. The word " dirt " was being used in a secondary and colloquial sense, and became a criticism or comment, and it was for the jury to say whether it was fair or not. Since *Kemsley* v. *Foot*[8] it is no longer necessary to set out the facts and then follow with the comment, so long as the article shows where the facts are to be found, and *Hunt* v. *Star Newspaper Co. Ltd.*[9] must be regarded as qualified accordingly. There was evidence given in the criminal trial regarding the petitions to the effect that they were concerned with police corruption and vice in the West End; that was sufficient fact on which the jury could find fair comment, if they thought fit, as they did; once there is such evidence an appellate court can only interfere if the verdict is perverse: see *Mechanical and General Inventions Co. Ltd.* v. *Austin.*[10]

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[1] [1903] 2 Q.B. 100; 19 T.L.R. 471.

[2] (1887) 20 Q.B.D. 275.

[3] [1908] 2 K.B. 309; 24 T.L.R. 452.

[4] [1909] 1 K.B. 239.

[5] [1952] A.C. 345; [1952] 1 T.L.R. 532; [1952] 1 All E.R. 501.

[6] [1909] 2 K.B. 958, 977.

[7] (1932) 34 N.S.W. 21.

[8] [1952] A.C. 345.

[9] [1908] 2 K.B. 309.

With more particular reference to the appeal of Addis, assuming that the references to " dirt " are fair comment, the question arises whether the inaccurate statement about the help he gave to Grech destroys the defence of fair comment. *Mangena* v. *Wright*[11] has stood for many years and has been followed since; if that case is right, it is difficult to see why an inaccurate remark made by a witness in court should not be a basis for fair comment. The article in question does not purport to be more than a summary of the court proceedings, reasonably condensed, and in view of the evidence of Page it should be entitled to protection.

[Jenkins L.J. Can an article be a fair and accurate report of judicial proceedings when it contains an inaccuracy and does not pretend to be a report of the proceedings?]

In *Morriss* v. *Victor Gollancz Ltd.*[12] the libel complained of appeared in a biography of Avory J. and made reference to the trial of the plaintiff 12 years previously; the case was treated as one concerning a fair and accurate report of judicial proceedings, notwithstanding the time which had elapsed.

[Parker L.J. When there is a vague hearsay statement by an untrustworthy witness, which is denied by the person concerned, can that be a proper basis for a statement of fact in the report?]

Grech never denied that Addis helped him; he refused to state the name of the person concerned. To sustain a plea of fair comment in a case concerned with evidence given in court, all that is necessary is to prove that the evidence was given, not that it was true; one can then comment on it: see *Cooper* v. *Lawson.*[13] Once the law allows, as it does, the reporting of judicial proceedings in a summary way, the reporter is allowed to draw an inference from the summary, and it was not an unfair inference, in view of the evidence, that Addis had been assisting Grech. [*Hedley* v. *Barlow*[14] and *Kane* v. *Mulvaney*[15] were referred to.]

Davidson following. The cases show that when the libel complained of is a report of judicial proceedings, a fair summary is enough, and trifling slips do not deprive the report of privilege. The criteria applicable are to be found in passages in Gatley on

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[10] [1935] A.C. 346.

[11] [1909] 2 K.B. 958.

[12] The Times, April 17, 1937.

[13] (1838) 8 A. & E. 746.

[14] (1865) 4 F. & F. 224.

[15] [1866] I.R. 2 C.L. 402.

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Libel and Slander, 4th ed., beginning at pp. 300 and 314. [*Hope* v. *Sir W. C. Leng & Co.*[16] was referred to.]

Allen in reply. *Thompson* v. *Truth and Sportsman Ltd.*[17] was a very special case and depended on the separation of the facts from the comment; in the present case everything was mixed up together. Privilege attaches only to reports of such documents as are read in open court; here only two small extracts from the petitions were read, and those were the only parts to which the reporter was entitled to refer. *Kemsley* v. *Foot*[18] shows that different considerations apply according to whether the document referred to is a well-known publication or something quite obscure, and according to whether the person concerned is a prominent public character or comparatively unimportant, because in the case of a well-known publication or a prominent public character the writer enables his readers to judge for themselves how far his opinion is fair comment without setting out the facts relied on.

Cur. adv. vult.

May 22. JENKINS L.J., delivering the judgment of the court, stated the facts, read extracts from the summing-up dealing with questions (1), (2) and (3) relating to Grech's case, and continued: In his judgment[1] the judge dealt in this way with the contention raised on behalf of Grech to the effect that the finding of fair comment in answer to question (4) was inconsistent with the findings in answer to questions (1) and (2) that the words were defamatory and untrue. He said this: "It is argued that those "two findings are inconsistent. In my view they are not neces-"sarily so. Otherwise, it seems to me that the defence of fair "comment would be almost valueless; for, if the jury found that "the words were not defamatory, or being defamatory were true, "then the defence of fair comment would not be needed.[2] The "answers to questions (1) and (2)—more particularly question "(2)—proceed, I think, on the hypothesis that the words com-"plained of were, or might be, statements of fact; and the jury "were saying, 'Well, on that hypothesis they were defamatory "'and untrue.' Then in question (4), they come to consider an "alternative hypothesis—namely, that the words were fair "comment—and they come to the conclusion 'Yes, they were

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[16] (1907) 23 T.L.R. 243.

[17] 34 N.S.W. 21.

[18] [1951] 2 K.B. 341; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331.

[1] [1958] 1 Q.B. 310, 313; [1957] 3 All E.R. 556, 557.

[2] [1957] 3 All E.R. 556, 557.

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“ ‘ comment and they were fair.’ Therefore, since one has to “ canvass every possibility in these cases and get answers from “ the jury to all questions which might conceivably arise, it does “ not surprise me that one receives answers such as I have “ received, and which, I repeat, I do not think were inconsistent, “ as is now claimed. It is said also that there is no evidence to “ support the finding of fair comment. I have made fairly clear “ my own view whether the words were comment at all, but it “ is the jury's view which matters and I cannot say that no “ reasonable person could construe the words as comment. “ Suppose that the ‘ Daily Herald ’ had written ‘ Grech drew “ ‘ up a petition to the Home Secretary. Our comment on the “ ‘ petition is that into it Grech put all the dirt he knew.’ If “ the jury read the words actually used in the present case as “ really coming to the same thing as the words that I have “ supposed, I could not say that it was unreasonable to do so. “ Comment, I suppose, is often to be recognized and distinguished “ from allegations of fact by the use of metaphor; and here, for “ what it is worth, resort was had to the language of metaphor. “ Again, I do not think that I can say there was no evidence of “ fairness. Some of the contents of the petition were referred “ to in court. It is clear from what was said in court that they “ were comprehensive. I may refer, in this connexion, to two or “ three questions and answers. The questions were addressed to “ Superintendent Hannam, and were these: . . .” The judge then read the passage from Superintendent Hannam's evidence and continued: “ It would be going too far on my part, I think, “ to say that it is unfair comment, when the petitions are so “ described, to say that into them somebody put all the dirt he “ knew, although, as a fact, that was not true. As a comment “ it might be the same thing as saying that in a defence the “ pleader raised every possible point of which he could think, or “ raised every defence that imagination could suggest. That “ would not be strictly true, but, as a comment, one would not “ say that it was unfair. I cannot say that the jury were perverse “ in finding that it was fair comment.” With those observations we respectfully agree.

The jury's answers must be reconciled so far as it is reasonably possible to do so, and we think they are fairly capable of reconciliation in the way indicated by the judge. The question whether the words were comment, and, if so, were they fair comment, was essentially a matter for the jury to decide, and we cannot hold that no reasonable jury could have decided it in the way this jury did. Accordingly, we would dismiss this appeal in the case of Grech.

The case of Addis appears to us to be essentially different. He was only dragged into the matter on the strength of an allegation that Grech drew up a petition to the Home Secretary into which he put " all the dirt he knew " and so on " with the help of " Jasper Addis, an ex-solicitor, one-time man of affairs to George " Dawson, and jailed for defrauding him."

It is common ground that Addis, in fact, had nothing whatever to do with the drawing up of either petition, and it appears to us quite impossible to hold or for any reasonable jury to hold that the statement that Grech put into his petition " all the dirt " that he knew " and so on was fair comment unless the statement on which the comment was based was either true or else a fair and accurate report of what was said in court. In the result the jury did find in favour of the defendants on the question of fair comment, having been directed as follows by the judge: " This, members of the jury, is a matter for me, and you must " take this from me, and my view upon it is this, that the fact " that Addis did not assist, and, therefore, that underlying fact " was untrue, does not of itself destroy the plea of fair comment, " because it was said in open court that Addis did assist Grech— " or, at any rate, that Grech had said so—and I think that fact, " namely, that it was said in open court, prevents the inaccuracy " of this statement from being fatal of itself to the plea of fair " comment. Just as I have the privilege of saying almost anything I like about anybody—sitting here—so has a witness who " goes into the witness-box and gives evidence. They have the " same privilege, and anything they say defamatory of someone " else is not actionable, if they say it in judicial proceedings. " Therefore, the fact that a witness said, inaccurately, that Grech " had told him, or implied inaccurately that Addis had assisted " Grech, does not of itself make this plea of fair comment unsustainable, but nevertheless the other difficulties in the " defendants' way on this plea may, in your view, be formidable " enough, anyway: Is the statement really comment at all? Is " it clear that it is comment, because it has got to be clear? If " so, is it fair comment? If you are in doubt about either of " these matters you should answer Question (3), in the case of " Addis, by saying 'No.' Only if you are satisfied that the " comment is fair comment, would you answer it 'Yes.' "

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In his judgment the judge said this[3]: " In the case of Addis, " I have already ruled that the repetition of a statement made by " a witness at the trial at the Central Criminal Court did not " destroy the plea of fair comment on the ground that the state- " ment turned out to be false. It is to be noted that what was " actually said in court by the witness Page (who was one of the " defendants in the case) was that Grech had told him, Page, " that Addis had assisted in the drawing up of the petition. In " cross-examination, Grech, who was a witness, said that some- " one assisted him, but gave no name. Grech said that the only " assistance given was to correct his grammar and punctuation. " The defendant's rendering of all this in the newspaper was " that Addis had helped, which no one had actually said at the " trial. This was simply the inference that the paper drew from " the evidence. No point has been raised, however, on this " interpretation of the evidence. The argument in the present " case was that, since the plaintiff Addis had not in fact helped, " the plea of fair comment could not be sustained and that the " decision in *Mangena* v. *Wright*[4] on this point is inapplicable. " The reason suggested is that in that case the instances given by " Phillimore J.,[5] of statements which were privileged although " inaccurate, were errors in a Parliamentary debate, or in the judg- " ment of a judge. But a witness's statements in the witness- " box are entitled, however, to the selfsame privilege: and if " comment may be fair although founded on the inaccurate state- " ment of a judge in judicial proceedings, I cannot see in principle " why comment may not also be fair although founded on an " inaccurate statement, similarly privileged, namely, that of a " witness in judicial proceedings."

It will be seen that the judge's opinion on this part of the case is based on the view that the untrue statement that " Jasper " Addis, an ex-solicitor . . ." helped Grech in drawing up his petition was a fair and accurate report of judicial proceedings in open court. The references made at the hearing to anyone helping in the drawing up of Grech's petition or petitions are these. This is the evidence of Grech: " (Q.) Did you write your first " petition, or did somebody write it for you? (A.) I wrote it. " (Q.) Did you write it with anybody's assistance? (A.) No. " (Q.) Any other person, for example? (A.) There might be some- " body who corrected my English—my mistakes. (Q.) Who " might that person be? (A.) I am afraid that, under prison

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[3] [1958] 1 Q.B. 310, 313; [1957] 3 All E.R. 556.

[4] [1909] 2 K.B. 958.

[5] Ibid. 977.

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"regulations and unless I am given the opportunity whether I "should answer this question or not, I shall be contravening the "regulations. (Q.) I do not want his name. Through another "prisoner? (A.) Yes, just corrected my letters, that is all. "(Q.) Just corrected your English? (A.) Yes." The other reference is when Page is giving evidence: "(Q.) Did you know "the people about whom he was complaining? (A.) Yes, Sir, "he was even telling me. (Q.) Did you know he was petitioning "the Home Secretary? (A.) Myself definitely. He kept telling "me about that, that he had sent a petition to the Home "Secretary and Scotland Yard and he was being helped in prison "by some solicitor by the name of Addis or something. That is "what he was mentioning to me."

We cannot regard these passages as justifying the claim that the categorical statement to the effect that "Jasper Addis, "an ex-solicitor . . ." helped Grech in the preparation of his petition was a fair or accurate report of the proceedings. There is nothing in Page's hearsay evidence beyond the statement that Grech told him that he was being helped in prison by "some "solicitor by the name of Addis or something"; and there is nothing in Grech's evidence to indicate that the unknown person who "corrected his English" was Jasper Addis.

The so-called fair and accurate report does not attribute the statement that "Jasper Addis, an ex-solicitor . . ." helped Grech to draw up the petition, to Page, but gives it as a statement of fact. In this it differs from the rest of the article which, taken as a whole, attributes the various statements to the various persons who made them. No doubt the reason for this omission is that no witness did so say. The writer jumped to the conclusion that the "Addis" referred to by Page was Jasper Addis and added the Christian name, which Page did not give, arriving as a matter of inference at the assumption that Jasper Addis was meant. He then adds true but derogatory facts about Jasper Addis. Moreover, the article contains no reference to Grech's evidence as to his unknown helper and the limited assistance which he gave. In our view, it would be impossible for a jury, properly directed, to hold that this was a fair and accurate report.

If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, then, no doubt, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment. But that is not this case.

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Accordingly we hold that the defence of fair comment cannot be supported in Addis's case.

As we have already said in the case of Grech, we think the words complained of are well capable of a defamatory meaning. But in Addis's case there is not and cannot be any defence of justification inasmuch as it is admitted that Addis had nothing to do with the drawing up of either petition.

In the result, the appeal in Addis's case must be allowed.

Appeal of Grech dismissed. Appeal of Addis allowed; order for new trial limited to the question of damages.

Solicitors: *Probyn, Dighton & Parkhouse; Simmons & Simmons.*

F. R. D.

1958
Mar. 25, 28.

Donovan J.

HAMILTON and Another v. WEST SUSSEX COUNTY COUNCIL and Another.

[1957 H. No. 992.]

Town and Country Planning—Planning permission—Outline permission—Application for permission to build cottage on "part of "approximately 40 *acres" of farm—Application accompanied by plan showing site of cottage—Outline permission subject to approval of "matters reserved"—Further application for permission to build cottage and garage—Site of cottage* 400 *yards from site on original plan—Different means of access—Whether new application—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 16 (3)*—Town and Country Planning General Development Order and Development Charge Applications Regulations,* 1950 (*S.I.* 1950, *No.* 728), *reg.* 5 (1), (2), (9) (*a*).

On February 12, 1955, the owner of a farm, Court Farm, applied to the local planning authority for development permission in respect of, inter alia, the erection of a replacement cottage. In the application, which was made on the prescribed printed form, the answer to a question asking for the address or location of the land to be developed was given as "Court Farm . . . " and the area of land to which the application related was stated to be "part of approximately 40 acres." The application was accompanied by a plan showing the proposed lay-out of the farm,

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[Reported by David Calcutt, Esq., Barrister-at-Law.]

including features not the subject of the application, and on it an outline of a cottage with a path leading to it from a private road across the farm was marked "New replacement cottage here." On April 27, 1955, the planning authority gave an outline permission under regulation 5 (2) of the Town and Country Planning General Development Order, 1950,[1] subject, inter alia, to the following conditions: "(*c*) any departure from the approved proposals being "made the subject of a fresh application" and "(1) . . . approval ". . . is required in respect of matters reserved in this permission "before any development is commenced; (2) the permission shall "become null and void unless satisfactory plans and elevations "giving details of the design and siting of the building are submitted to and approved by the local planning authority within "two years . . ." On October 17, 1956, a mortgagee in whose favour the landowner had executed a legal charge of her interest submitted to the planning authority a further application stated to relate to "3·21 acres," for permission to erect a cottage and garage in accordance with specifications, plans and elevations attached to the application; those plans showed the new cottage on a site about 400 yards away from the site shown on the plan accompanying the first application and with a curved gravel path leading to the farm road. On November 19, 1956, the planning authority refused that application, stating the following reasons for the refusal: "The "development is contrary to the planning proposals for the area "in that (*a*) the land is not allocated for residential development "and (*b*) the proposal conflicts with the local planning authority's "intentions regarding residential development as set out in the "written statement accompanying the development plan."

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[1] Town and Country Planning General Development Order, 1950, reg. 5: "(1) An application to a "local planning authority for planning permission shall be made on a "form issued by the local planning "authority . . . , and shall include "the particulars required by such "form to be supplied, and be accompanied by a plan sufficient to "identify the land to which it relates "and such other plans and drawings "as are necessary to describe the "development which is the subject of "the application, . . . : and a local "planning authority may by a direction in writing . . . require such "further information to be given to "them in respect of an application "for permission made to them under "this paragraph as is requisite to "enable them to determine that application. (2) Where an applicant so "desires, an application, expressed to "be an outline application, may be "made under the preceding paragraph "for permission for the erection of "any buildings subject to the subsequent approval of the authority with "respect to any matters relating to "the siting, design or external "appearance of the buildings, or the "means of access thereto, in which "case particulars and plans in regard "to those matters shall not be "required and permission may be "granted subject as aforesaid (with "or without other conditions) or "refused, provided that:—(i) where "such permission is granted, it shall "be expressed to be granted under "this paragraph on an outline application and the approval of the "authority shall be required with "respect to the matters reserved in "the permission before any development is commenced; (ii) where "the authority are of opinion that ". . . the application for permission "ought not to be considered "separately from the siting, design "or external appearance of the "buildings, or the means of access "thereto, they shall within . . . one "month . . . , notify the applicant "that they are unable to entertain "such application, specifying the "matters as to which they require "further information for the purpose "of arriving at a decision in respect "of the proposed development, and the "applicant may either furnish the information so required . . . or appeal "to the Minister under section 16 (3) "of the Act . . . , as if his outline "application had been refused by the "authority. . . . (9) (*a*) in the case "of an application for planning permission or approval, where the local "planning authority decide to grant "such permission or approval subject "to conditions or to refuse it, they "shall state their reasons in "writing, . . ."

In an action by the landowner and the mortgagee alleging that, since the refusal made no reference to the matters reserved in the outline permission, those matters must by inference be deemed to have been approved; they claimed a declaration that the outline permission of April 27, 1955, was a good and valid permission within the meaning of the Town and Country Planning Act, 1947, which now entitled them to proceed with the erection of the cottage and garage in accordance with detailed plans submitted on October 17, 1956. The planning authority alleged that the application of October 17, 1956, was a fresh application which had been considered on its merits and refused:—

Held, (1) that the land which had been the subject of the outline application in February, 1955, and the grant of the outline permission in April, 1955, included the whole of Court Farm, and not merely the land on which the replacement cottage had originally been sited.

(2) That regulation 5 (2) of the Town and Country Planning General Development Order, 1950, had no application to a private road; and that it was, accordingly, immaterial that the position of the private road was not the same in the 1956 application as it had been in the original application.

(3) That the 1956 application was not, accordingly, a new application; and that therefore the planning authority's reasons for refusing the 1956 application were wrong and could not be sustained. Since the planning authority had already considered the matters reserved in the outline permission, and had found nothing to which they wished to object, they were not entitled to consider the reserved matters a second time.

ACTION.

On February 12, 1955, written application was made on behalf of the first plaintiff, Audrey Joyce Hamilton, the owner in fee simple of Court Farm, West Wittering, Sussex, to the second defendants, the Chichester Rural District Council, which exercised planning functions delegated by the first defendants, the West Sussex County Council, the local planning authority, for development permission. The application was made on the prescribed printed form and stated "I/We hereby apply for permission to "carry out the development described in this application and on "the attached plans and drawings"; the form contained a number of questions to which answers were given, which included the following: " (2) Address or location of the land to be developed. " Please give enough detail for it to be easily identified (e.g., in " the case of undeveloped land give name or classification number " of adjoining roads and quote Ordnance field parcel number). " —Court Farm, West Wittering. (4) Particulars of the proposed " development . . .—(a) Conversion of two old cottages into one " sound ditto and (b) erection of one replacement cottage. " (5) Area of land to which the application relates.—Part of " approximately 40 acres. (7) If the application involves any " new access to a road or any alteration of an existing access give " particulars . . .—No new access. (8) Particulars of the exact " position at which new or altered access is required . . .—See " plan attached." The application was accompanied by a covering letter stating " I enclose herewith plan showing the ultimate " layout of [Court Farm] which as you will see is being treated " as an orchard farm. Further fields will possibly be laid down " in due course particularly to the south of the estate. There are " two cottages . . . at the position marked 'A' on the town " planning application plan enclosed, which are in poor order. " I am proposing to turn these two cottages into one first-class " ditto and to build a replacement cottage at the position marked " 'B.' The new cottage would be constructed of old bricks, flints " and tiles to blend with the existing house and other cottages " on the land. I would be grateful, therefore, to receive your " approval so that detailed plans can be prepared for building " by-laws. Although it is not a subject of this application, at a " later date I hope to be able to allow the villagers . . . to play " cricket on the field shown on the layout plan."

The plan attached to the application bore the legend " Layout " of Cottages, Gardens and Orchards Proposed at Court Farm " House, West Wittering " and showed details of the farm house and outbuildings, cottages, gardens, lawns, paddock, orchards and roads; on the plan, marked " A " and " The two old cottages to " be made into one good ditto " were the outlines of a building and garden, and marked " B " and " New replacement cottage " here " was the plan of a cottage and garden with a pathway leading to it from a private road running through the farm. There was also shown on the plan a cricket field, pavilion and car park, and various fields and farmlands, the outer farmlands being shown by broken lines which did not continue to the margins of the plan.

On April 27, 1955, the second defendants gave written " Permission For Development of Land subject to Conditions " which was stated to be subject to the following printed conditions: "(a) due compliance with the by-laws and general statutory provisions in force in the district; (b) the proposed development being carried out strictly in accordance with the detailed drawings and written particulars approved by the council; (c) any departure from the approved proposals being made the subject of a fresh application;" and the following additional conditions: "(1) The permission hereby granted is an outline permission under regulation 5 (2) of the Town and Country Planning General Development Order, 1950,[1] and the approval of the local planning authority is required in respect of matters reserved in this permission before any development is commenced. (2) The permission shall become null and void unless satisfactory plans and elevations giving details of the design and siting of the building, are submitted to and approved by the local planning authority within two years of the date hereof. The above conditions are imposed to comply with the provisions of regulation 5 (2) of the Town and Country Planning General Development Order, 1950."[1]

On December 8, 1955, the plaintiff executed a legal charge of her interest in Court Farm to secure an advance made by the second plaintiffs, the Rowland Hill Permanent Building Society, and it was admitted that the society, in granting the advance, had relied on the outline planning permission and had valued the land on the footing that it had the benefit of the permission.

On October 17, 1956, a further application was made on behalf of the second plaintiffs for permission to erect a cottage with a garage on the land in accordance with specifications, plans and elevations attached to the application which gave details of the design and siting of the building. That application was made on a printed form similar to the one used for the application of February 12, 1955, and the following were the material answers given: question 4 "Cottage and garage," question 5 "3·21 acres," question 7 "Vehicular access to new garage" and question 8 "Entry to site." Accompanying the application were a layout plan, a block plan and ground plans of the proposed building. On the first two plans the proposed new cottage was shown as in the same orchard but in a different site from the cottage which had been marked "B" on the plan accompanying the application of February 12, 1955, and with a curved gravel path giving access to the farm road.

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[1] Ante, p. 287.

On November 19, 1956, the second defendants, by a written notice, refused that application, giving the following as their reasons for the refusal: "The development is contrary to the "planning proposals for the area in that (a) the land is not "allocated for residential development and (b) the proposal conflicts with the local planning authority's intentions regarding "residential development as set out in the written statement "accompanying the development plan."

The plaintiffs sued the defendants for a declaration (1) that as a necessary inference from the reasons stated by the refusal of permission dated November 19, 1956, the defendants were to be deemed to have approved the plans and elevations submitted with the application of October 17, 1956, and (2) that the outline permission of April 27, 1955, was a good and valid permission within the meaning of the Town and Country Planning Act, 1947, which now entitled them (the plaintiffs) to proceed with the erection of the cottage and garage the plans, elevations and details of which were submitted to the defendants with the application of October 17, 1956.

The defendants alleged, inter alia, that the site of the proposed cottage and garage as delineated on both the layout and block plans submitted with the application of October 17, 1956, was considerably different from the site of the cottage marked on the plan submitted with the application of February 12, 1955, the two sites being 400 feet or more apart, and that the proposal contained in the application of October 17, 1956, contained a departure from the proposal approved by them on April 27, 1955, and constituted a fresh proposal which they had considered on its merits and refused. They also alleged that no plans or elevations giving details of the design and siting of the building referred to in the application of February 12, 1955, had been submitted to or approved by the planning authority and that the period of two years referred to in condition 2 of the permission of April 27, 1955, had expired, and they denied that the plaintiffs were entitled to the relief sought. The plaintiffs in reply denied that the application of October 17, 1956, was a fresh proposal and alleged that the outline permission of April 17, 1955, was a permission to erect one cottage on the area of land mentioned in the application of February 12, 1955, subject only to the stipulations and conditions therein contained; that, since the application of October 17, 1956, was for the erection of a cottage on that area of land it was within the outline permission; and that the siting of the cottage within the area of land was one of the matters reserved by the conditions of the outline permission, and in that respect they relied upon the fact that no objection was raised to the proposed siting in the reasons stated for the refusal. They also contended that the plans, elevations and specifications which accompanied the application of October 17, 1956, gave the required details of the cottage to be erected pursuant to the outline permission.

Further facts are stated in the judgment.

L. A. Blundell for the plaintiffs. The outline permission of April 27, 1955, was a planning permission subject only to the reserved matters of design and siting. Details of those reserved matters were duly supplied in October, 1956. The defendants' refusal of November 19, 1956, raised no objection to any of the details of the reserved matters but was based on reasons not competent to be advanced at that stage, and, therefore, by implication was an approval of the details of the reserved matters. Accordingly, the outline permission is a valid planning permission entitling the plaintiffs to proceed with the erection of the cottage and garage. The Act and the regulations envisage one planning permission, not two; the outline permission was subject to conditions which have been satisfied and it is now too late for the defendants to raise any objections. Had objection to the siting of the cottage been made at the proper time the plaintiffs would have had an opportunity of considering the matter and resubmitting plans complying with the defendants' requirements as to that; by giving an invalid refusal and in failing to raise the question of the site until their defence in these proceedings, the defendants have deprived the plaintiffs of that opportunity.

Nigel Bridge for the defendants. The outline planning permission attached the benefit of a right to erect a cottage to one piece of land and it is conceded that, had a detailed application been made to erect a cottage on the piece of land to which the outline permission related, it could not have been refused. But, on the construction of the documents, the detailed application of October 17, 1956, showed an intention to erect a cottage on land outside the parcel of land to which the outline permission related, and was, therefore, a fresh application. The fact that the defendants may have stated the wrong reasons for their refusal of that application makes no difference. It is not correct to say that they raised the question of siting at too late a stage; it was not for them to point out that they were bound to treat the detailed application as a fresh application.

The identification of the land to which the application of February 12, 1955, related is not to be collected from the answer to question 2 on the application form, for that question only asks for the address. The application was accompanied by a plan showing practically the whole of the farm, and it would be absurd to suppose that by that answer the first plaintiff intended to apply for permission to build a cottage anywhere upon the 40 acres of the farm. The answer to question 5 does not make it clear to what part of the 40 acres the application is intended to relate, and therefore the plan accompanying the application must be looked at to see if it contains anything showing the proposed curtilage or building plot. The plan does indicate a proposed curtilage with detail and clarity, and therefore the curtilage indicated is the parcel of land to which the application relates. The matter may be tested by visualizing the converse position: had a purchaser bought the parcel of land shown on the plan as the proposed curtilage of the cottage and submitted a detailed application, it would not have lain in the mouths of the defendants to say that the cottage must be built elsewhere on the farm. Regulation 5 (1) requires an applicant to supply a plan sufficient to indicate the land to which it relates; that must mean the land which is to be affected by the development which the applicant desires to carry out. Section 12 (2) of the Town and Country Planning Act, 1947, defines "development" as "the "carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material "change in the use of any buildings or other land," and applying that definition, the land to be affected by the development which the first plaintiff desired to carry out was that shown on the plan as the curtilage of the proposed cottage. The application, therefore, identified that particular parcel of land and it is that parcel of land to which it relates. If that is wrong, the application is ambiguous, for there is no means of telling to what part of the farm it relates; moreover, certain of the boundary lines do not run to the margins of the plan and it stops short of enclosing a complete area. If it was intended that the application should relate to the whole of the farm, it was unnecessary to show the proposed curtilage. The fact that the obligation to supply plans may be waived under regulation 5 (2) does not affect the initial obligation to identify the land under regulation 5 (1). One of the purposes of the regulations is to enable persons such as the second plaintiffs to know to what particular parcel of land the benefit of an outline permission attached.

The "means of access" to the proposed building is one of the matters which a planning authority may reserve under regulation 5 (2). The plan accompanying the application of February 12, 1955, showed a pathway leading to the proposed site of the new cottage, and as "means of access" was not reserved in the outline permission, the permission related to that defined means of access. But on the plan accompanying the detailed application of October 17, 1956, the means of access to the cottage and garage was shown as a curved gravel path following a different line and leading to a different part of the land; and compare the answers to questions 7 and 8 in the two applications. That reinforces the submission that the application of October 17, 1956, was outside the scope of the outline permission and one which the defendants were bound to consider again.

If the application of October 17, 1956, was not a fresh application and the refusal of permission was invalid, that does not mean that the refusal amounted to permission, but merely that the defendants misapprehended the nature of the application and did not apply their minds to the reserved matters. The implication that they approved the details of the reserved matters is not justified; nor does the fact that they dealt with the application on the wrong basis and gave the wrong reasons for refusal preclude them from considering the application on the right basis: see the observations of Hodson L.J. in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government.*[2] It is immaterial that the time for submitting detailed plans has expired under condition 2 of the outline permission, because there must be implied a condition that the defendants would consider the detailed application within a reasonable time. The possibility that the defendants have now no power to consider the application does not bear on the question whether or not they have in fact considered it; if the refusal is a nullity, then they have failed to determine the application and the plaintiffs have a right of appeal to the Minister under section 16 (3) of the Act.[3]

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[2] [1958] 1 Q.B. 554, 578–579; [1958] 1 All E.R. 625.

[3] Town and Country Planning Act, 1947, s. 16: "(1) Where application "is made . . . to a local planning "authority for permission to develop "land, . . . and that permission or "approval is refused . . . or is granted ". . . subject to conditions, then if "the applicant is aggrieved by this "decision he may . . . appeal to the "Minister; (3) unless within such "period as may be prescribed by the "development order, . . . the local "planning authority either (*a*) give "notice to the applicant of their decision on any application for permission to develop land, . . . or (*b*) give "notice to him that the application "has been referred to the Minister

Blundell in reply. It is clear on the face of the application of 1955 that it was not limited to any particular curtilage. The purpose of question 2 on the application form is to identify the land, and had it been intended to limit the application to a particular piece of land the parcel number of the orchard would have been inserted; see the wording of the question. Equally the answer to question 5, "part of approximately 40 acres," must refer to all the land shown on the plan and can only relate to an application at large. In this respect it is worth noting that the plan showed the ultimate layout of the whole farm and included items, such as the cricket field, not the subject of the application. The approach to the cottage shown on the plan accompanying the application of February 12, 1955, was only part of the general layout and did not form part of the application. "Access," for the purpose of the Act and regulation, means access to a public road; the gravel path shown on the plan of 1956 leads to a private road and is not a means of access within the meaning of the regulation. The planning authority are not interested whether access is to a particular point on a private road.

If it was not competent to the defendants to refuse the application of October 17, 1956, the plaintiffs are entitled to the declarations sought as a matter of justice. They should not be put in peril of their application being found to be out of time under the condition in the outline permission. Nor, on the facts, is it open to the defendants to say that they have not approved the detailed designs. There is no evidence that they did not apply their mind to the reserved matters.

Cur. adv. vult.

March 28. DONOVAN J. read the following judgment. The first issue in this case is the identity of the land in respect of which the outline application was made on behalf of the first plaintiff in February, 1955. She says that it was Court Farm, West Wittering, as shown on the plan accompanying the application. Both defendants say it is only a very small part of that farm as so shown, namely, a small plot on which the proposed new cottage was to be erected (hereinafter called "the small plot").

The importance of the issue is this. If the land the subject of the outline application were Court Farm, the defendants admit

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". . . the provisions of subsection (1) "of this section shall apply in relation to the application as if the "permission . . . to which it relates "had been refused . . ."

that the reasons given for refusing the further application for planning permission made in October, 1956 (hereinafter called "the 1956 application"), were wrong and cannot be sustained. The 1956 application was submitted on behalf of the second named plaintiffs consequent upon the grant of outline permission to the first plaintiff, and it comprised the detailed drawings called for by the terms of the outline permission. If, on the other hand, the land the subject of the outline application were the small plot alone, then the reasons given for the refusal of the 1956 application were not wrong. The reason is that the new cottage was shown in the 1956 application as sited upon a different portion of Court Farm, so that the 1956 application would, upon the above hypothesis, be a new application in respect of different land.

Under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development, etc., Regulations, 1950 (hereinafter called "the regulations"), it is for the person who wishes to develop land to make application for planning permission; and under regulation 5 of the regulations it is for him to indicate what land it is that he wishes to develop. He must do this by means of particulars and a plan. The particulars are to be those required by a form to be issued by the local planning authority, and the plan is to be sufficient to identify the land.

The first plaintiff complied with these requirements when making application for outline permission. On the form her agent, Mr. Hamilton, gave particulars of the land the subject of the application, describing it as Court Farm, and he annexed the plan of that farm. The form also required the applicant to state the area of land to which the application related and Mr. Hamilton gave as the answer "part of approximately 40 acres." If the application related only to the small plot all he need have given was the acreage of that plot, namely, some 2 acres.

The application also sought outline planning permission to convert two old cottages into one in a different part of Court Farm, these two old cottages being also shown on the same plan. There is some doubt whether planning permission was really necessary for this work, but that is beside the point. The fact that it was sought reinforces the view that the land the subject of the application was Court Farm and not merely the small plot. The terms of Mr. Hamilton's covering letter of February 14, 1955, indicating the owner's intentions with regard to Court Farm generally, have the same effect.

The defendants say that if one looks at the plan submitted with the outline application, the small plot has its own curtilage marking it off from the rest of Court Farm; and if a purchaser of the small plot had bought it with the benefit of the outline permission he would have had a real grievance if final permission were eventually refused because the planning authority thought the cottage ought to be sited elsewhere on Court Farm.

It is agreed by the defendants that if their view be right there should have been two outline applications, one for the small plot and the other in respect of the two cottages to be modernized into one (assuming that planning permission was necessary for this latter work). But it is argued that this is a slip that can be overlooked.

The difficulties in the way of these contentions are, first, that there is no evidence that the small plot was in fact at the time of the outline application contained in its own curtilage, even assuming this to be relevant. The letter of February 14, 1955, which accompanied the plan, says expressly that the plan shows "the ultimate layout," and to this day there may be, for all I know, no such curtilage of the small plot as the defendants assert. Secondly, so far as the hypothetical purchaser of the small plot is concerned, he would see from the document granting outline permission that it referred to a cottage on Court Farm, and was subject to a condition that satisfactory plans giving details, inter alia, of the siting had to be submitted to and approved by the planning authority within two years. He could hardly complain, therefore, if he took the risk that the planning authority would eventually approve the particular site shown on the outline application.

In all the circumstances it seems to me quite clear that the land the subject of the outline application and of the grant of outline permission was Court Farm and not the small plot.

The defendants then raise a further point, also designed to show that the 1956 application was really a new application altogether. They say that on the plan submitted for outline permission a form of access from the proposed cottage to a road was shown, whereas on the final plans a different form of such access is shown. It is said that this alone makes the 1956 application a new one, and regulation 5 (2) is relied upon in this connexion. The point is not foreshadowed in the defence, at least with any particularity, but no objection was raised on this score on behalf of the plaintiffs. The defendants, however, in their outline permission of 1955 made no reservations whatever on the subject of access. And in any event, say the plaintiffs without contradiction, the new access merely connects with the same road at a different point, and the road itself is a private road on the farm and not a public road at all. Obviously where a public road is concerned, matters of access from new buildings concern the planning authority very much. But they hardly do so where the access is simply to a private road on the same land; and I do not think that regulation 5 (2) has any application to such a road. It may be that the planning authority took the same view originally, and that this explains why no reservation whatsoever on the subject-matter of access was made when outline permission was granted. In any event I think the point without substance for the reason that I have given.

The defendants concede that if they fail in their contention that the 1956 application was really a fresh application altogether, then their reasons for withholding planning permission were misconceived and wrong. What follows, it is said, is this: that they have never considered the right question, namely, whether the matters reserved in the outline permission have been satisfactorily arranged, and that therefore they should now be given the opportunity of considering whether this is so.

The matter needs careful consideration, first, because of the extra burden involved for the plaintiffs, who have proceeded quite correctly throughout, and, second, because the two years specified in the outline permission as the time within which detailed plans had to be approved, have now expired. The defendants say that they would not take any point on this in the circumstances, seeing that the plans were submitted in time, but this very proper attitude does not of itself confer jurisdiction.

When the detailed plans called for by the outline permission were submitted with the 1956 application one of two things happened: either the reserved matters, such as design and siting, were not considered at all, because the defendants decided to reject the application on principle; or they were considered and while the defendants found them unobjectionable they nevertheless decided to reject the application, again on principle. Which of these two things occurred it would have been quite easy for the defendants to prove, but no one went into the witness-box on their behalf, and I am thus left to draw a conclusion from the facts revealed by the documents before me. They are these. (1) The same officers as considered the outline application considered also the 1956 application. (2) With that latter application the second plaintiffs submitted plans and elevations giving details of design and siting of the cottage pursuant to the conditions contained in the outline permission. (3) The previous documents relating to the outline permission were in front of the aforesaid officers when they considered these plans and elevations. They must have known, therefore, that what they were being asked to do was to say whether they approved them pursuant to the aforesaid conditions. The case is not one where the officers concerned for the planning authority inadvertently overlooked the previous grant of outline permission subject to conditions. They had this outline permission and its conditions well in mind at the time. (4) The defendants say in their defence that they considered the application on its merits and decided to refuse. In these circumstances regulation 5 (9) (*a*) imposed on the defendants the obligation to state their reasons in writing, which means all their reasons and not some, and the reason given was simply that the development proposed was contrary to the planning proposals for the area. (5) From start to finish no objection has ever been raised to the design or siting of the cottage, or to the details as shown on the plan submitted with the 1956 application. The defendants in their defence refer to the different siting of the cottage not as something that still awaits approval but simply as a fact supporting the argument that the 1956 application was a new application altogether.

On these facts I draw the conclusion that the defendants, through their officers, considered those matters, when the 1956 application was before them, which had been reserved in the 1955 outline permission—as indeed was their duty—and found nothing to which they wished to object. The attitude they took was that, while the applicant's proposals were unobjectionable with regard to reserved matters, the work of converting the two old cottages into one had not been done and that this entitled them to consider the whole matter afresh and to refuse permission on grounds of principle. As soon as the defendants came into court this claim was abandoned. They are not now entitled to consider the reserved matters a second time. It is true that they have not formally said, " We approve ", but there is nothing which obliges them to use any such particular expression. If they could find no objection after examining the applicant's proposals they could not properly withhold approval.

In these circumstances I grant the second declaration asked for by the plaintiffs, which seems to me to cover the whole matter.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Lees & Co.*

C. A.

1958
May 9,
12, 13;
June 13.

Jenkins,
Parker and
Pearce L.JJ.

AIREY *v.* AIREY.

[1957 A. 754.]

Limitation of Action — Death of tortfeasor — Limitation applicable — Lapse of six years—Letters of administration taken out—Action brought within six months thereafter—Whether action statute-barred—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1) (3)—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 32.

On February 24, 1951, the driver of a motor-car was killed in an accident in which his passenger was injured. Letters of administration to the driver's estate were not taken out until March 18, 1957. On September 9, 1957, the passenger issued a writ against the administrator of the driver's estate, claiming damages for negligence in respect of the injuries which she had sustained in the accident. The defendant contended that the action was barred by section 2 of the Limitation Act, 1939.[1]

Diplock J. held that the action was one for which a period of limitation was prescribed by the Law Reform (Miscellaneous Provisions) Act, 1934,[2] and, therefore, the Limitation Act, 1939, did not apply by virtue of section 32 of that Act; accordingly, since proceedings were taken within six months of taking out letters of

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[1] Limitation Act, 1939, s. 2: "The following actions shall not be "brought after the expiration of six "years from the date on which the "cause of action accrued, that is to "say:—(*a*) actions founded on simple "contract or on tort; . . ."

S. 32: "This Act shall not apply "to any action or arbitration for "which a period of limitation is pre-"scribed by any other enactment, ". . ."

[By s. 34 (4) and the Schedule, ss. 3, 4 and 7 of the Limitation Act, 1623, were repealed.]

[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1): "Subject "to the provisions of this section, on "the death of any person after the "commencement of this Act all causes "of action subsisting against or "vested in him shall survive against, "or, as the case may be, for the "benefit of, his estate. . . . (3) No "proceedings shall be maintainable in "respect of a cause of action in tort "which by virtue of this section has "survived against the estate of a "deceased person, unless either—(*a*) "proceedings against him in respect "of that cause of action were pending "at the date of his death; or (*b*) [the "cause of action arose not earlier "than six months before his death "and] proceedings are taken in "respect thereof not later than six "months after his personal represen-"tative took out representation. "(4) Where damage has been "suffered by reason of any act or "omission in respect of which a cause "of action would have subsisted "against any person if that person "had not died before or at the same "time as the damage was suffered, "there shall be deemed, for the pur-"poses of this Act, to have been "subsisting against him before his "death such cause of action in respect "of that act or omission as would "have subsisted if he had died after "the damage was suffered."

[Note: The words in square brackets were repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954.]

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administration, the action fell within section 1 (3) of the Act of 1934 and was not barred.

On appeal:—

Held, (1) that the provision in section 1 (3) (*b*) of the Act of 1934, barring an action under the section unless brought within six months of the taking out of representation, constituted a period of limitation;

(2) (reversing Diplock J.) that in an action brought under the section against the estate of a deceased tortfeasor before the coming into force of the Act of 1939, the six months' period of limitation would have been the sole period applicable, so that the Act of 1939 did not alter the law in such a case;

(3) (affirming Diplock J.) that, as the action was one for which a period of limitation was prescribed by the Act of 1934, after the coming into force of the Act of 1939 the six years' period of limitation prescribed by section 2 was excluded by section 32.

Quaere: Whether, since the passing of the Law Reform (Limitation of Actions, etc.) Act, 1954, such an action which had become statute-barred in the lifetime of the tortfeasor could be maintainable after his death, provided that it was brought within six months of the taking out of representation.

Decision of Diplock J. [1958] 1 W.L.R. 729; [1958] 2 All E.R. 59 affirmed in the result.

APPEAL from Diplock J.

On February 24, 1951, Isaac Airey was the driver of a motor-car in which the plaintiff, Elizabeth Scott Airey, was a passenger. The motor-car became involved in an accident, as the result of which the driver was killed and the plaintiff injured. On March 18, 1957, letters of administration to the estate of Isaac Airey were taken out by the defendant, John Calvert Airey. On September 9, 1957, the plaintiff issued a writ against the defendant claiming damages for negligence in respect of the injuries which she had sustained in the accident. The defendant contended that since proceedings had not been commenced within six years of the alleged accrual of the cause of action, such proceedings were barred by section 2 of the Limitation Act, 1939. On December 13, 1957, it was ordered that the point should be tried as a preliminary issue. Diplock J. gave judgment for the plaintiff. The defendant appealed.

Patrick O'Connor and *E. W. Eveleigh* for the defendant. The Act of 1934 provided for the survival of the liability of a tortfeasor after his death in a case involving personal injuries; up till 1939 there were two periods of limitation in such a case: the general period of six years prescribed by the Limitation Act, 1623, and the special period of six months provided by the Act of 1934 for the protection of administrators. It is now claimed by the plaintiff that section 32 of the Act of 1939 has the effect of ousting the six-year period provided by section 2 of that Act.

The " any other enactment " must be one ejusdem generis with the Act of 1939; that is the conclusion to be reached when studying the whole Act; its provisions deal with periods of limitation running from the time when a cause of action accrued or a right was infringed. The Acts repealed by section 34 are of this type, but the Act of 1934 is not; time runs from an event which is unconnected with the accrual of the cause of action.

General words in a statute admit of expansion or restriction according to the subject which they treat: see Maxwell on the Interpretation of Statutes, 10th ed., p. 18; what may be within the literal meaning of words will not be so construed if it is repugnant to the intention of the legislature (see Maxwell, pp. 3, 17 and 19), and to find that intention one must look at the whole Act: see p. 28. This is a consolidating Act, and there is a presumption against an alteration of the law: see Maxwell, p. 81, a passage approved in *Murugiah* v. *Jainudeen.*[3]

There is nothing in the Act of 1934 to suggest that Parliament intended to alter the general limitation periods laid down by the Act of 1623; much clearer language would be necessary to effect so important a change. Section 32 of the Act of 1939 cannot be reasonably construed to achieve that effect. The Act of 1934 does not deal with a period of limitation running from the time when a cause of action accrues; its purpose was to abolish the actio personalis rule, subject to certain provisions for the protection of administrators. It would not have been affected by any provisions of the Act of 1939.

The decision of the judge below is contrary to the rule that radical changes in the law are not to be presumed in a consolidating Act: see *Attorney-General* v. *Parsons*, *per* Lord Jowitt,[4] and *Morelle Ltd.* v. *Wakeling*, *per* Evershed M.R.[5] *Bagettes Ltd.* v. *G. P. Estates Ltd.*[6] shows that a literal construction is not to be adopted, contrary to what appears to be the intention of the enactment, unless it is the only construction possible. [*In re Bidie*[7] and *Canada Sugar Refining Co. Ltd.* v. *The Queen*[8] were also referred to.] It cannot have been intended that an existing cause of action, to which section 2 of the Act of 1939 applied, should cease to be subject to the section on the happening of an extraneous event, the death of the tortfeasor.

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[3] [1955] A.C. 145.

[4] [1956] A.C. 421, 439; [1956] 1 All E.R. 65.

[5] [1955] 2 Q.B. 379, 399; [1955] 1 All E.R. 708.

[6] [1956] Ch. 290; [1955] 3 All E.R. 451.

[7] [1949] Ch. 121 (C.A.); [1948] 2 All E.R. 995.

[8] [1898] A.C. 735; 14 T.L.R. 545.

Roy Wilson Q.C. and *Paul Curtis-Bennett* for the plaintiff. Before 1934 the death of a tortfeasor in a case of personal injury imposed its own limitation; there was no room for any statutory limitation. It is submitted that between 1934 and 1939 the Act of 1623 did not apply in addition to the express limitation under the Act of 1934; such an action was inconceivable when the Act of 1623 was passed. The Act of 1934 created a new legal right, but not a new cause of action, and the express period of limitation which it provides negatives any implication that the Act of 1623 was to apply.

Some analogy is provided by certain cases arising under the Fatal Accidents Act, 1846, where the limitation is 12 months after the death in question, and a conflict arose between that period and the six months allowed by the Public Authorities Protection Act, 1893. The result was broadly this: if the injured man had not brought his claim within the six months and then died, the claim was barred, but if he died within the six months the Act of 1893 did not continue to run after his death so as to bar the claim. An Act such as that of 1934, which creates a new right and imposes its own limitation, should be regarded as self-contained and not liable to be defeated by other statutory limitations.

After 1939 there is no escape from the conclusion that this is an action for which a period of limitation is prescribed by another enactment, and the decision below was right; the defendant can only succeed if the clear meaning of the words is cut down.

The six months' period originated in section 2 of the Civil Procedure Act, 1833, which abolished the actio personalis rule in respect of actions based on wrongs to property; that section was repealed by the Administration of Estates Act, 1925, but substantially re-enacted by section 26 (5), which was itself repealed by the Act of 1934, which extended the period to all forms of tort. So that it was an established form of limitation, and was referred to in *Jay* v. *Jay*[9] as a "period of limitation" imposed by the Act of 1833. There are certain references in textbooks which state that the six years' period of limitation was also applicable, but these are without authority, and it is submitted that they are erroneous: see note to section 32 in Halsbury's Statutes,

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[9] [1924] 1 K.B. 826, 831.

2nd ed., vol. 13, p. 1195; Preston & Newsom on Limitation, pp. 271 and 274, and Salmond on Torts, 12th ed., p. 756. But the 9th and 10th editions of Salmond, edited by Dr. Stallybrass, indicated that the six years' period prescribed by the Act of 1623 did not apply, and he took the same view regarding the Act of 1939.

Section 32 uses clear words which have a recognized meaning, and there is no ground for construing them as "another enactment similar to this Act." Where it is sought to place a special meaning on a clear and commonly used expression, then two things at least must be shown: (1) the adoption of the ordinary meaning must give rise to some injustice or anomaly or illogicality, and (2) there must be some criterion by which the narrower interpretation can be justified. Neither factor is present here. First, there is no injustice or anomaly or illogicality; the application of the Act of 1934 is fair both to the executors and to the injured party. The startling consequences envisaged by Diplock J.[10] were not the subject of argument and will not arise in view of the authorities which indicate that, if the tortfeasor had remained alive for six years, there would be no cause of action "subsisting against him" within section 1 (1) of the Act of 1934: see *British Electric Railway Co. Ltd.* v. *Gentile*[11] and *Venn* v. *Tedesco*.[12] Even if the consequences envisaged did follow, that would be no reason for giving section 32 other than a plain meaning. Secondly, there must be some effective yardstick or criterion. The defendant wants to justify the construction "any "other enactment similar to this Act" by contending that the "other enactment" must be one in which the period of limitation is ascertainable by reference to the accrual of a cause of action or the infringement of a right. Such a criterion is unjustified; in many cases in the Act of 1939 one cannot find the terminus ad quem by reference to the accrual of the cause of action, e.g., in cases of disability, part payment, fraud or mistake. The same consideration applies to some of the statutory enactments repealed, e.g., 4 & 5 Anne, c. 16, s. 19, and sections 4, 5 and 6 of the Civil Procedure Act, 1833, all of which deal with periods which cannot be ascertained from the accrual of the cause of action.

Eveleigh in reply. Before 1939 the Acts of 1623 and 1934 were both applicable. No statute will repeal another by implication, and there is nothing in the Act of 1934 which shows an intention to repeal the Act of 1623: see Maxwell, p. 160. The effect of the Act of 1934 is to make the action survive the tortfeasor's death, but, other things being equal, it must be brought within six months. Section 1 (3), in dealing with an action of tort, places it at a disadvantage compared with other actions, while the plaintiff's construction gives it a more favourable effect. [*Bowring-Hanbury's Trustee* v. *Bowring-Hanbury* [13] was referred to.]

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[10] [1958] 1 W.L.R. 729, 734.

[11] [1914] A.C. 1034; 30 T.L.R. 594.

[12] [1926] 2 K.B. 227; 42 T.L.R. 478.

Section 32 of the Act of 1939, read with reference to the history of limitation and with the Act as a whole, must be considered to deal only with things in pari materia with the Act itself. It is a saving section, so the intention is to preserve what would otherwise be destroyed. Such a clause imports such words as "which is in conflict with this Act." If before 1939 the Acts of 1623 and 1934 were existing quite happily side by side, there was no need of a savings clause to preserve the Act of 1934, so the clause cannot be meant to apply to that Act.

The general scheme of Limitation Acts is to limit the action from the date of accrual of the cause, but the Act of 1934 is different. Section 1 (3) (*b*) does not provide a period of limitation; it prescribes conditions to be fulfilled when action is brought. It is only the "literal" principle of construction which favours the plaintiff's case; all the other principles are in favour of the defendant. The fact that Parliament has used wide general words does not mean that they are to have a wide and general application (see Maxwell, p. 18); to ascertain the intention, an Act must be construed as a whole (see p. 24), and is to be construed according to the will of them that made it: see p. 1. [*Heydon's Case* [14] was referred to.]

Section 32 is a savings clause, and if the plaintiff is to escape the prima facie application of the Act of 1939 he must bring himself within it. Such a clause is introduced to save analogous legislation, and section 1 of the Act of 1934 is not analogous; it deals with times and periods which are not analogous to the ordinary periods of limitation, and anything which is not analogous is not affected by section 32. The Act of 1934 is not inconsistent with the Act of 1939 and is not within the contemplation of the savings clause. The only provisions saved are those which deal with similar subject-matter in an inconsistent way; the point is illustrated by *Baxendale* v. *Great Eastern Railway Co.*[15]

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[13] [1943] Ch. 104; 59 T.L.R. 121; [1943] 1 All E.R. 48.

[14] (1584) 3 Co.Rep. 7b.

Cur. adv. vult.

June 13. JENKINS L.J. read the judgment of the court. This appeal arises in an action brought by Mrs. Elizabeth Scott Airey against her husband, John Calvert Airey, as administrator of the estate of their son, Isaac Airey, deceased, for damages for personal injuries sustained by the plaintiff in an accident brought about by the negligent driving by the son of a motor-car in which the plaintiff was a passenger. The son was unfortunately killed in the accident, and the plaintiff accordingly sued his administrator in reliance on section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934.

The accident happened on February 24, 1951. Letters of administration to the son's estate were granted to the defendant on March 18, 1957, and the writ in the action was issued on September 9, 1957, which date, it will be observed, was less than six months after the grant of representation but more than six years after the accident.

In these circumstances the defendant raised a defence to the effect that the action was statute-barred by virtue of section 2 of the Limitation Act, 1939, inasmuch as it had not been brought within the period of six years from the date on which the cause of action accrued.

This plea of limitation was set down for hearing as a preliminary point of law, and came before Diplock J. who, by his judgment dated March 28, 1958, rejected the defence based on section 2 of the Limitation Act, 1939. From that judgment the defendant (with the leave of the judge) now appeals to this court.

The question whether an action such as this is subject to the period of limitation (six years at the material time) imposed on actions in tort by section 2 of the Limitation Act, 1939, turns first on the provisions of section 1 of the Law Reform Act, 1934, by which the right to bring an action such as this was conferred, and in particular the position in regard to limitation under those provisions and (if and so far as applicable) the provisions of the Limitation Act, 1623, as the law stood when the Act of 1934 came into force; and secondly, on the effect of certain provisions of the Act of 1939 on the position previously obtaining in regard to the limitation of an action such as this under the provisions of section 1 of the Act of 1934, and (if and so far as applicable) those of the Act of 1623.

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[15] (1869) L.R. 4 Q.B. 244.

The relevant provisions of the Act of 1934 are these: [His Lordship read section 1 (1), (3) and (4), and continued:] It should also be noticed that by section 1 (7), subsections (1), (2), (5) and (6) of section 26 of the Administration of Estates Act, 1925, were repealed.

The relevant provisions of the Act of 1939 are these: [His Lordship read sections 2 (1) (*a*), 32 and 34 (4), and continued:] We need hardly say that the law as enacted by section 1 (1) of the Act of 1934 was not by any means wholly new. The subsection brings together all causes of action (whether in contract or in tort) subsisting against or vested in any person at the time of his death, and provides that (with certain specific exceptions not material for the present purpose) all such causes of action shall survive against or, as the case may be, for the benefit of his estate.

So far as causes of action in contract are concerned, this was merely declaratory of the existing law, inasmuch as the maxim actio personalis moritur cum persona had never been applicable to causes of action in contract. So far as causes of action in tort were concerned statutory provision had already been made for the survival against the estate of the deceased tortfeasor of causes of action in tort involving injury to property. To carry this aspect of the matter no further back, we would refer to section 2 of the Civil Procedure Act, 1833, which was repealed as regards deaths after 1925 by section 56 of the Administration of Estates Act, 1925, and the part of which here relevant was substantially re-enacted as regards such deaths by section 26 (5) of the same Act, which subsection was in turn repealed by section 1 (7) of the Act of 1934.

The substantial change in the law brought about by section 1 (1) of the Act of 1934 was the extension of the principle of survival to causes of action in tort involving personal injuries as in the present case.

Section 1 (1) deals uno flatu with all causes of action whether they survived under the previous law or not. The category of those which already survived is typified by causes of action in contract. The category of those which did not previously survive but were made to survive by the Act is typified by causes of action in tort involving personal injury. This subsection is silent as to the period of limitation to be applied to actions by or against personal representatives in respect of surviving causes of action, but, apart from any special provision as to limitation, the only period of limitation which could be applicable in 1934, if there was to be any limitation at all, was, so far as causes of action in simple contract or tort were concerned, the period of six years prescribed by the Limitation Act, 1623. It had been established long before the Act of 1934 that so far as causes of action in contract were concerned the six-year period of limitation applied whether the action was between the original parties to the contract or between one of such parties and the personal representative of the other, or between the personal representatives of both. It is therefore not open to doubt that surviving causes of action in contract remained after the Act of 1934, as they had previously been, subject to the six-year period of limitation prescribed by the Act of 1623, computed from the date of the breach.

But what was the bearing of the Act of 1623 on causes of action which did not previously survive but were for the first time made to do so by the Act of 1934? On the defendant's side it may be said that section 1 (1) of the Act of 1934 created no new causes of action in tort but merely invested causes of action in tort formerly subject to the maxim actio personalis moritur cum persona with the quality of survival for the purposes of suit by and against the personal representatives of the original actors, and, accordingly, that the Act of 1623 applied to such surviving causes of action just as it would have done if both the original actors had remained alive, subject, of course, to any provision to the contrary contained in the remainder of section 1 of the Act of 1934.

On the other hand, it may be said on the plaintiff's side with some plausibility that (so far, at all events, as actions involving injury to the person are concerned) the right to bring proceedings against the personal representatives of a deceased tortfeasor, which section 1 (1) of the Act by making the cause of action survive impliedly confers on the injured party or his personal representative, and also the right to bring proceedings against the tortfeasor himself similarly conferred on the personal representative of a deceased injured party, are entirely new rights of action created by the Act of 1934. How, it may be asked with some force, can the Act of 1623 be held applicable to a statutory right of action such as this, which could not possibly have been in contemplation when the Act of 1623 was passed, and was, indeed, a right of action, unknown to the law until the Act of 1934 ordained otherwise some 300 years later?

We think that the former argument should prevail. It appears to us to be reasonably plain that the intention of section 1 (1) of the 1934 Act was (subject to any provision to the contrary elsewhere in the section) to place the personal representative of any person who, at the time of his death, had any cause of action vested in or subsisting against him in the same position as nearly as may be with respect to that cause of action, for all purposes including limitation, as that person would have been in if he had not died. Thus, each surviving cause of action must be taken to have survived with and subject to the same right to plead or liability to be barred by the relevant Limitation Act as was applicable to it in the lifetime of the deceased, save in so far as any provision to the contrary is to be found in the remainder of section 1 of the 1934 Act. It is unnecessary to enlarge on the absurdities which would result from the adoption of the opposite view.

But, says the plaintiff, even if it is right to hold that subject to any provision to the contrary in the rest of section 1 of the Act of 1934, subsection (1) has the effect of preserving with respect to surviving causes of action the same periods of limitation as would have been applicable if there had been no death, the section does contain in subsection (3) a provision to the contrary so far as an action such as the present one is concerned, that is to say, an action brought against the estate of a deceased tortfeasor in respect of a tort committed in his lifetime. That special provision in the plaintiff's submission must be considered as exhaustive so far as an action such as this is concerned, and as ousting the application of the six-year period prescribed by the Limitation Act, 1623, if and so far as that period would otherwise have been applicable.

Subsection (3) of section 1 provides that no proceedings shall be maintainable in respect of a cause of action in tort which by virtue of section 1 has survived against the estate of a deceased person unless the conditions in one or other of paragraphs (*a*) and (*b*) of the subsection are fulfilled. Paragraph (*a*) requires that proceedings in respect of that cause of action should have been pending at the date of the death of the deceased. That, of course, was not the case here, but in cases in which paragraph (*a*) did apply, the pending proceedings would as we think, in conformity with the view above expressed, remain subject to any defence of limitation which would have been open to the deceased in his lifetime. The vital provision for the purposes of this case comes in paragraph (*b*) which in cases where the proceedings are not pending at the date of the death of the deceased imposes the two-fold condition that: " the cause of action arose not earlier "than six months before his death and proceedings are taken in "respect thereof not later than six months after his personal "representative took out representation."

The maximum period of six months before the death within which under paragraph (*b*) surviving torts must have been committed in order to be actionable at all after the death is not, we think, strictly a period of limitation. It is not a period within which action must be taken. It is an ambulatory restriction upon the injured party's right to proceed against the estate of a deceased tortfeasor after his death, whenever he may die. In other words, it imposes as a condition precedent to the maintainability of an action against the estate of a deceased tortfeasor the requirement that the tort should have been committed within six months of his death.

The second branch of paragraph (*b*), on the other hand, to our minds clearly imposes a period of limitation. It provides that the action is not to be maintainable unless proceedings are taken in respect of the cause of action in question not later than six months after the personal representative of the deceased tortfeasor took out representation.

The plaintiff, as we have said, contends that this special provision as to the limitation of actions of this particular kind is exhaustive, and had the effect of ousting the application of the six-year period prescribed by the Act of 1623 if otherwise applicable.

On the other hand the defendant says that this special provision is in addition to and not in substitution for the six-year period so prescribed, and this is the view which commended itself to the judge.

We cannot agree. The defendant's construction involves the reading of the condition in question as requiring not simply that the proceedings should be taken not later than six months after the personal representative took out representation, but that the proceedings should be taken not later than the expiration of six months from the taking out of representation or the expiration of six years from the date on which the cause of action arose, whichever is the earlier. We see no sufficient warrant for attributing this effect to section 1 (3) (*b*). If it had been intended that actions such as this should be subject not only to the special period of limitation expressly prescribed, but also to an overriding limitation period of six years from the accrual of the cause of action, section 1 (3) (*b*) would surely have contained some reference to the latter. Prima facie if it is enacted that a particular kind of action is only to be maintainable if brought within a specified time, that means that it is, so far as time is concerned, to be maintainable if it is brought within that specified time.

In the present instance, there appear to us to have been perfectly good grounds for limiting actions against the estates of deceased tortfeasors in the special way adopted in section 1 (3) (*b*). One may talk loosely of the bringing of an action against the estate of a deceased tortfeasor, but of course such an action is in truth an action against his personal representative as representing his estate, and until a personal representative is duly constituted no such action can be brought. It is therefore perfectly appropriate to make any period of limitation applicable to such an action run from the date when representation to the estate of the deceased tortfeasor is taken out, as the earliest date on which the injured party might have brought his action against the personal representative. That is the principle of limitation adopted here, and it seems to us inconsistent with that principle to import an overriding fixed period of six years from the date when the cause of action arose. If the principle is that time is to run in favour of the personal representative from the earliest date on which the injured party might have brought his action against the personal representative, then the expiration of the fixed period of six years from the date when the cause of action accrued appears to us to be an irrelevant consideration. If the fixed period was applied as an overriding period of limitation, it would only have operated in the very rare cases (of which this is one) in which (having regard to the first branch of section 1 (3) (*b*)) representation was not taken out until as long as five-and-a-half to six years from the date of the death, and when it operated would have had the effect of barring the injured party's right to sue the personal representative before there was any personal representative to be sued.

The persons interested in the estate of the deceased tortfeasor could not, so far as we can see, be prejudiced by the exclusion of the fixed six-year period of limitation in favour of a period of six months running from the date on which representation was taken out, for it would be open to them at any time to obtain a grant, thus compelling the injured party to bring his action within the ensuing six months on pain of its becoming statute-barred. Moreover, until representation is taken out there cannot be any lawful administration or distribution of the deceased tortfeasor's estate, so it cannot be said that in the interval (however long) between the death of the tortfeasor and the grant of representation the absence of a fixed period of limitation would result in the administration and distribution of the deceased's estate being held up by reason of the injured party's outstanding claim.

In sum, we think the intention of the second branch of section 1 (3) (*b*) of the Act of 1934 was first to give the injured party a reasonable chance of bringing his action against the personal representative of the deceased tortfeasor by making time run against the injured party only from the date on which representation to the estate of the deceased tortfeasor was taken out, so as to constitute a personal representative for the injured party to sue; and secondly to obviate delay in the administration and distribution of the deceased tortfeasor's estate by fixing the short period of only six months from the grant as the period within which the injured party must bring his action on pain of its becoming statute-barred. It appears to us that at all events when taken in conjunction with the restriction of the right to bring such an action to torts committed within six months of the death of the tortfeasor contained in the first branch of section 1 (3) (*b*), the second branch so construed provided a perfectly fair and adequate mode of limitation.

If it is asked why section 1 of the Act of 1934 should in this matter of limitation treat surviving causes of action in tort differently from surviving causes of action in contract, the short answer is that for whatever reason section 1 (3) (*b*) did, according to its plain terms, make special provision in this respect for actions in tort brought after the death of the deceased tortfeasor. But it is, we think, possible to go further than that. The position as regards the limitation of actions against the estates of deceased contractors was well settled before the Act of 1934 came into force, and it may well have been thought advisable to leave that position undisturbed. On the other hand, until the Act of 1934 came into force the only provisions operative as regards the limitation of actions brought against the estates of deceased tortfeasors were those contained in section 26 (5) of the Administration of Estates Act, 1925 (re-enacting the relevant part of section 2 of the Civil Procedure Act, 1833), in relation to the survival of causes of action in tort involving injury to property.

Section 26 (5) of the Act of 1925 was in these terms:—" An " action may be maintained against the personal representative " of a deceased person for any wrong committed by the deceased " within six months before his death to another person in respect " of his property, real or personal, but the action shall be brought " within six months after the personal representative of the " deceased has taken out representation. Any damages recovered "in the proceedings shall be payable as a simple contract debt "incurred by the deceased."

One may compare the relevant part of section 2 of the Act of 1833 which was as follows:—" . . . and further, an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person "deceased, for any wrong committed by him in his lifetime to "another, in respect of his property, real or personal, so as such "injury shall have been committed within six calendar months "before such person's death, and so as such action shall be brought "within six calendar months after such executors or administrators "shall have taken upon themselves the administration of the "estate and effects of such person; and the damages to be "recovered in such action shall be payable in like order of "administration as the simple contract debts of such person."

There was no provision extant as regards the limitation of surviving causes of action in respect of torts involving injury to the person for the simple reason that causes of action in tort of that description did not survive.

The language of section 26 (5) of the Act of 1925 and its precursor section 2 of the Act of 1833, quoted above, closely resembles the language of section 1 (3) (*b*) of the Act of 1934. We think it is reasonably plain that the period of limitation provided for in the two earlier of these enactments must be taken to have been exhaustive, and to have excluded any application of the six-year period of limitation to the cases to which it applied.

As we have said, section 1 (7) of the Act of 1934 repealed section 26 (5) of the Act of 1925 which had itself repealed section 2 of the Act of 1833.

Next, one may observe that the Act of 1934, having by section 1 (1) made all causes of action in tort whether to property or person survive against the estate of a deceased tortfeasor, treats them all alike for the purposes of the limitation imposed by section 1 (3) (*b*), and frames the limitation provision in terms closely resembling those used in the Acts of 1833 and 1925 in relation to surviving torts against property.

We think that these circumstances, which seem to us to provide a sufficient explanation of the special treatment as regards limitation accorded to actions against the estates of deceased tortfeasors, can legitimately be taken into account for the purpose of resolving any doubt as to the exclusion of the six-year period of limitation under the Act of 1623 in cases to which section 1 (3) (*b*) of the Act of 1934 applies, and in our judgment they tend to support the view that it was excluded.

If we are right so far, it appears to us to be really clear beyond argument that the six-year period of limitation imposed by section 2 of the Limitation Act, 1939, with respect to actions in tort cannot be applicable to the present action any more than the like period imposed by the Act of 1623 would have applied if the Act of 1939 had not been passed.

The repeal effected by section 34 of the Act of 1939 of the old six-year period of limitation did not, ex hypothesi, affect actions such as the present one, because that period of limitation had never applied to them. If the Act of 1939 had imposed its own substituted six-year period of limitation on all actions of tort without saving or qualification it might have been found, surprisingly enough, to have applied for the first time sub silentio to actions such as the present one a six-year period of limitation to which they had never before been subject. That curious result is, however, to our minds wholly excluded by the saving provision in section 32, which so far as material for the present purpose provides that: "This Act shall not apply to any action . . . for which "a period of limitation is prescribed by any other enactment . . ."

If our view as to the exclusion of the old six-year period of limitation is accepted, then it follows that before the Act of 1939 came into force actions such as the present one were subject to one period, and one period only, of limitation, viz., the period of six months from the taking out of representation to the estate of the deceased tortfeasor imposed by section 1 (3) (*b*) of the 1934 Act. This was, in our view, a period of limitation prescribed by another enactment, viz., the Act of 1934, with the result that the actions to which it applies were excluded from the operation of the Act of 1939 by section 32 of that Act, and that the status quo with regard to the limitation of such actions was thus preserved.

The judge while holding, contrary to our view, that actions to which section 1 (3) (*b*) of the Act of 1934 applied were, before the Act of 1939 came into force, subject to the six-year period of limitation under the Act of 1623, nevertheless came to the conclusion that since the Act of 1939 came into force neither the old nor the new six-year period has been applicable to such actions. He reached this conclusion (in effect) on the ground (i) that section 3 of the Act of 1623 which imposed the old six-year period was repealed by section 34 of the Act of 1939 and so ceased to apply; and (ii) that the new six-year period introduced by section 2 of the Act of 1939 did not apply either, because an action of this kind was one for which a period of limitation (viz., the period of six months from taking out representation) was prescribed by another enactment (viz., section 1 (3) (*b*) of the Act of 1934), and was consequently excluded from the operation of the Act of 1939 by the saving provision contained in section 32.

We confess that if we agreed with the judge that the old six-year period was applicable to actions of this class before the 1939 Act came into force, we would be reluctant (as he clearly was himself) to hold that the Act of 1939, which does not even mention the Act of 1934, had the apparently accidental effect of abrogating for no discernible reason the six-year period of limitation previously applicable to them. But having regard to the view we take, it is unnecessary to discuss what the position would then have been.

We also find it unnecessary to discuss the effect of the repeal by section 4 of the Law Reform (Limitation of Actions, etc.) Act, 1954, of so much of section 1 (3) of the Act of 1934 as provides that an action is not to be maintainable in respect of a surviving cause of action in tort unless the cause of action arose not earlier than six months before the death of the deceased, which has no bearing on the present case. We mention it only for the purpose of disclaiming any view one way or the other on the question whether the conclusion we have reached in this case involves the corollary that actions which were statute-barred in the lifetime of a tortfeasor become once more maintainable after his death, provided that they are brought within six months of the taking out (at any distance of time) of representation to his estate.

For the reasons we have stated we would dismiss this appeal.

Appeal dismissed.

Solicitors: *L. Bingham & Co.; Theodore Goddard & Co. for Swinburne & Jackson, Gateshead.*

F. R. D.

1958
May 21,
22, 23;
June 18.

Devlin J.

POTATO MARKETING BOARD *v.* MERRICKS.

Agriculture — Agricultural marketing — Potato — Whether power to "enter and inspect" land includes power to measure—Whether power improperly exercised—Demand for information about potatoes and total arable acreage of farm—Whether demand, if partly bad, severable—Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *s.* 5 (*g*) (*h*)—*Agricultural Marketing Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 38), *ss.* 5 (1) (*a*), 8—*Potato Marketing Scheme* (*Approval*) *Order,* 1955 (*S.I.* 1955, *No.* 690), *paras.* 81, 82, 83.

Agriculture—Disciplinary committee—Special case—Application of Arbitration Acts—Whether court has power to remit award—Chairman of committee—Whether paid chairman an "independent person"—Agricultural Marketing Act, 1949, *ss.* 5 (1) (*a*), 8—*Potato Marketing Scheme* (*Approval*) *Order,* 1955, *para.* 83—*Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

Tribunal—Statutory—"Independent person" as chairman—Barrister chairman of disciplinary committee of agricultural marketing board —Paid fee by board—Whether independent.

Statutory Power—Exercise—Mala fides—Onus of proof.

Statutory Power — Exercise — Demand ultra vires — Good in part — Whether severable.

Severability of Documents.

Meaning of "as if"—Agricultural Marketing Act, 1949, *s.* 8—*Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

Pursuant to the provisions of the Agricultural Marketing Acts, 1931 to 1949,[1] the Potato Marketing Scheme (Approval) Order,

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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[1] Agricultural Marketing Act, 1931, s. 5: "Subject to the approval "of the Minister, a scheme may pro- "vide for all or any of the matters "set out in one or more of the follow- "ing paragraphs, that is to say:— ". . . (*g*) for empowering any person "authorized in writing by the board, "for the purpose of securing com- "pliance with the scheme, to enter "and inspect, at any reasonable time "and on production of his authority, "any part of the land or premises "occupied by any registered producer "(being a producer specified in the "authority) which the person so "authorized has reason to believe is "used for producing the regulated "product or for doing any of the "following things which is regulated "by the scheme, that is to say, "grading, marking, packing, or "storing the regulated product or "adapting it for sale; (*h*) for requir- "ing registered producers to furnish "to the board such estimates, "returns, accounts and other informa- "tion relating to the regulated pro- "duct as the board consider "necessary for the operation of the "scheme; . . ."

S. 6: "(1) Every scheme shall "provide for the following matters, "that is to say:— . . . (*d*) for "securing that any producer who is "aggrieved by any act or omission "of the board may refer the matter "to one or more arbitrators appointed "in such manner as may be provided "by the scheme, and for the manner "in which any such reference is to "be heard and determined."

Agricultural Marketing Act, 1949, s. 5: "(1) Every scheme under the

1955,[2] set up a potato marketing scheme, under which M. was registered with the Potato Marketing Board as a registered producer. In 1957 he grew potatoes at his farm in Kent, but by September 20, 1957, had failed to inform the board of the acreage of potatoes planted by him at his Kent farm in 1957. On September 26, 1957, four persons were sent by the board to measure the acreage of potatoes on M.'s farm, but M. removed and threw aside two measuring poles that had been placed in the ground, and refused to permit the use of a measuring chain, so that the attempt

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"principal Act shall, notwithstanding anything in that Act, be so "framed as to secure—(*a*) that there "is a committee of the board, to be "known as the disciplinary committee, constituted, at each sitting "thereof, of not less than four nor "more than six members of the board "and a chairman, who is not a "member of the board but is an "independent person who is a barrister of not less than seven years' "standing, an advocate of not less "than seven years' standing or a "solicitor of not less than seven "years' standing and is approved by "the Minister."

S. 8: "Section 12 of the Arbitration Act, 1889, and section 10 of "the Arbitration Act, 1934, . . . and "section 9 of the Arbitration Act, "1934, . . . shall apply in relation "to the hearing and determining of "the matters which by virtue of "any of the preceding provisions of "this Act are referred to the disciplinary committee of a board, and "in relation to the enforcement of "the decisions of that committee, as "if the proceedings were an arbitration under a submission to which "the board and the producer were "parties and as if the disciplinary "committee were the arbitrator or "umpire under the submission."

[2] Potato Marketing Scheme (Approval) Order, 1955, para. 81: "(1) "The board may, whenever they "consider it necessary for the operation of this scheme so to do, serve "on any registered producer a "demand in writing requiring him to "furnish to them such estimates, "returns and other information "relating to potatoes as may be "specified in the demand."

Para. 82: "(1) Any person authorized in writing by the board may "for the purpose of securing compliance with this scheme, enter and "inspect at any reasonable time and "on production of his authority any "part of the land or premises occupied by a registered producer (being "a producer specified in the authority) "which the person so authorized has "reason to believe is used for producing potatoes or for doing either "of the following things which is for "the time being regulated under the "scheme, that is to say, packing and "storing potatoes."

Para. 83: "(1) (*a*) If any "registered producer fails without "reasonable excuse to comply with "any demand or requirement made "by the board in pursuance of "paragraph 81 of this scheme, or if "he knowingly or recklessly makes "any false statement in complying "therewith, or if he obstructs or "interferes with any person duly "authorized by the board under paragraph 82 (1) of this scheme, the "disciplinary committee hereinafter "described shall impose upon him "and the board shall recover from "him, such monetary penalty not "exceeding £200 as that committee "think just. . . . (2) (*a*) There shall "be a committee of the board, to be "known as the disciplinary committee, constituted, at each sitting "thereof, of not less than four nor "more than six members of the "board and a chairman who is not a "member of the board but is an "independent person who is a barrister of not less than seven years' "standing, an advocate of not less "than seven years' standing, or a "solicitor of not less than seven "years' standing and is approved by "the Minister."

to measure his land proved abortive. On October 3, 1957, a demand in writing was served by the board on M. requiring him to inform them of the acreage of each variety of potato, the acreage of all the potatoes, and the total arable acreage of the farm. M. failed to comply with the demand.

M. was charged before the disciplinary committee of the board with obstruction of the board's officers in their attempt to measure his land, and with failure, without reasonable excuse, to comply with the demand served on him. The chairman of the committee, who was not a member of the board, was a barrister of more than seven years' standing and was paid by the board a fee for his services. The committee found the charges proved and fined M. £50 and £20 respectively in respect of each of the charges:—

Held, (1) that the power under paragraph 82 (1) of the scheme to "enter and inspect" land was wide enough to permit ordinary measurement of the land.

(2) That the burden of proving bad faith was on the person asserting it, and M. had failed to prove that the attempt to measure was not a proper exercise of the power given by paragraph 82 (1), or that that power was used other than for the purpose of securing compliance with the scheme.

Barber v. *Manchester Regional Hospital Board* [1958] 1 W.L.R. 181; [1958] 1 All E.R. 322 applied.

(3) That the composite demand served on October 3 was partly bad in so far as it required information about total arable acreage of the farm, which could not be information "relating to potatoes" within paragraph 81 (1), but the demand was nevertheless valid since the bad part could be severed from the good.

(4) That the chairman was "an independent person" within paragraph 83 of the scheme, notwithstanding that he was paid for his services by the board, since "independent," in the context in which it appeared, did not refer to financial independence, but to the detached and dispassionate nature of someone unconnected with the industry; accordingly, the committee had been properly constituted.

(5) That the court had no power to remit the award to the committee for further consideration; a special case under the Agricultural Marketing Act, 1949, section 8, did not give the court the powers of remission contained in section 22 of the Arbitration Act, 1950.

Special case stated by a Disciplinary Committee of the Potato Marketing Board, pursuant to section 8 of the Agricultural Marketing Act, 1949.

Jack Merricks (referred to in the special case as "the "respondent"), a registered potato producer under the Potato Marketing Scheme set up by the Potato Marketing Scheme (Approval) Order, 1955, was charged before a disciplinary committee of the Potato Marketing Board with the following offences under the scheme: (1) that on September 26, 1957, at Lodgeland Farm, Ruckinge, near Ashford, Kent, he obstructed persons duly authorized by the board under paragraph 82 (1) of the scheme, contrary to paragraph 83 (1) (*a*) thereof; (2) that he failed without reasonable excuse to comply with a demand in writing served on him by the board on or about October 3, 1957, requiring him to furnish to the board information relating to potatoes planted in 1956 and 1957, contrary to paragraph 83 (1) (*a*) of the scheme.

The committee, the chairman of which was Mr. J. P. Stimson, a barrister of over seven years' standing, stated their award in the form of a special case, and found the following facts: At all material times the respondent was registered under the scheme. In 1957 he grew potatoes on land occupied by him at Lodgeland Farm, Ruckinge, near Ashford, Kent. In 1957 each registered producer of potatoes was liable to contribute to the funds of the board the sum of £1 for each acre planted by him with potatoes in that year. On September 26, 1957, the respondent had not informed the board of the acreage of potatoes planted by him in the year 1957 at Lodgeland Farm. On September 26, 1957, four persons authorized by the board in writing entered upon Lodgement Farm and attempted, by means of the ordinary instruments for the measurement of land, to measure the acreage of Lodgeland Farm then used for producing potatoes. The respondent obstructed the above persons or some of them by removing and throwing aside two measuring poles which had been placed in the ground and by refusing to permit the use of a measuring chain. The committee found by inference that the attempt to measure was made for the purpose of securing compliance with the scheme.

On October 3, 1957, the board served on the respondent a demand in writing requiring him to furnish the board with information relating to potatoes grown by him on land occupied by him in Kent and on land occupied by him in Sussex during each of the years 1956 and 1957. He refused to comply with the demand, there was no reasonable excuse for such non-compliance, and by reason of his non-compliance the board suffered loss in the sum of £25. The committee found by inference that on October 3, 1957, the board considered it necessary for the operation of the scheme to serve the above demand upon the respondent.

None of the members of the committee had at any material time played any part in the events giving rise to the charges.

It was contended for the respondent that the committee had no jurisdiction to hear and determine the charges brought against him because the scheme was invalid in that it empowered the board to exercise control over the production of potatoes and to discriminate financially between one registered producer and another, and was accordingly beyond the powers conferred by the Agricultural Marketing Acts, 1931 to 1949; and/or that the committee was not constituted in accordance with paragraph 83 (2) (*a*) of the scheme in that the chairman received a fee from the board for his services and was therefore not an independent person as required by the paragraph. It was further contended that paragraph 82 (1) of the scheme did not confer a power to measure land of a registered producer used for producing potatoes, or, alternatively, if it did, the power was discretionary and that on the evidence the board attempted to use it for an improper purpose, namely, as a test of strength rather than for the purpose of securing compliance with the scheme; that there was no evidence on which the committee could find that the attempt to measure on September 26, 1957, was for the purpose of securing compliance with the scheme. It was also contended that the demand in writing served on the respondent on October 3, 1957, was invalid in that it required the respondent to supply information to which the board was not entitled, and information which was already known to the board and was in any event of no value to the board and/or information in a form to which the board was not entitled, and that the demand exceeded the powers conferred on the board by paragraph 81 (1) of the scheme; and further or alternatively that for these reasons the respondent had reasonable cause for not complying with the demand; and that there was no evidence on which the committee could find that the board considered it necessary for the operation of the scheme to serve on the respondent the above demand in writing.

Subject to the opinion of the court, the committee found each of the charges proved and imposed on the respondent in respect of the first charge a penalty of £50 and in respect of the second charge a penalty of £20, and further ordered the respondent to pay to the board £25 as the sum which justly represented the loss to the board by reason of his contravention of the scheme.

The questions for the decision of the court were: (1) whether the committee had jurisdiction to hear and determine the charges; (2) whether paragraph 82 (1) of the scheme conferred a power to measure the land of a registered producer used for producing potatoes; (3) whether, if it did, the attempt to measure in this instance was a proper exercise of the power; (4) whether there was any evidence on which the committee could find that the persons who attempted on September 26, 1957, to measure the respondent's land were so doing for the purpose of securing compliance with the scheme; (5) whether the demand in writing served on the respondent on October 3, 1957, was valid; (6) whether the committee were entitled to find that the respondent had no reasonable cause for not complying with the demand; and (7) whether there was any evidence on which the committee could find that on October 3, 1957, the board considered it necessary for the operation of the scheme to serve on the respondent the aforesaid demand in writing.

Ian Percival and *Michael Thomas* for Merricks. The committee had no jurisdiction to hear and determine the charges because the scheme is ultra vires the Acts of 1931 and 1949, since it purports to exercise control over production and discriminates financially between producers, whereas the Acts are marketing Acts. Section 1 (8) of the Act of 1931 states that the scheme shall become effective on the making of an order by the Minister, " . . . and the making of the order shall be conclusive " evidence that the requirements of this Act have been complied " with and that the order and scheme thereby approved have " been duly made and approved and are within the powers " conferred by this Act." It is conceded that the Divisional Court's decision in *Ex parte Ringer*,[3] on a similar section in the Agricultural Holdings Act, 1908, rejecting a similar submission of ultra vires because of those words, binds this court. The point is therefore taken formally and the right to challenge that decision in a higher court is reserved.

On the facts found by the committee it was not proper to draw the inference that the attempt to measure was done for the purpose of securing compliance with the scheme. Since the purpose of the attempt to measure the land is a fact peculiarly within the board's knowledge the onus is on the board to prove that purpose as a fact and to show that it was a legitimate one. The failure to do so is a lacuna in the evidence that cannot be cured by inference.

The words " enter and inspect " do not, in their natural and ordinary meaning, include the power to measure. The Oxford English Dictionary defines " to inspect " as being " to look into, " examine, observe, view, look at, to find out the character or " condition "; it does not include the ascertainment of the size of an object, which is something totally different from its condition. Where Parliament intends the power of measurement to be given, it specifically says so—there are numerous statutes which say that a person may "inspect, survey and measure." Looking at the scheme as a whole it is plain that there is no function which the board has to perform for which precise measurement is essential. Admittedly the board has functions where such a power is undoubtedly useful, for example, its function of collecting the levy—which is calculated on an acreage basis—but it is not sufficient to say that because it is convenient to measure the power to do so must be implied. To imply that power it must be shown that the duties placed on the board could not be carried out without it. The board would not be crippled by the construction it is sought to place on these words; section 6 of the Act of 1949 gives the board the power of estimating the acreage.

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[3] (1909) 25 T.L.R. 718.

The courts have held that the power to inspect the register of a company includes the right of taking copies; if it were otherwise, the benefits of inspection would be illusory. *Mutter* v. *Eastern and Midlands Railway Co.*[4] and *In re Balaghât Gold Mining Co. Ltd.*[5] show that the court will be slow to imply incidental powers. The present is the type of power to which the principle of strict interpretation should be applied, for it confers a privilege on a private body of individuals and the powers granted infringe the liberties of the subject. It would be repugnant to established principles of the common law to adopt a construction that gives the board, in effect, an open search warrant on someone's land. If the board have difficulties as a result of a strict interpretation, they should be solved by amending legislation, not by interpretation.

The chairman of the committee cannot be said to be independent if he is paid by the board. The word "independent" in its normal meaning includes financial independence; a person receiving payment for his services from some other person is dependent on that other person, and if he is dependent, even in one sense, he cannot be said to be independent. It would be repugnant to common sense and decency for the chairman of a bench of magistrates to be paid by the prosecutor. To interpret the word "independent" in its plain meaning avoids the repugnancy.

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[4] (1888) 38 Ch.D. 92; 4 T.L.R. 377.

[5] [1901] 2 K.B. 665.

In the board's letter of October 3, 1957, demanding information under paragraph 81 of the scheme two of the accompanying four forms related to the year 1956. These were unnecessary and useless because the board knew aliunde that no potatoes had been grown on Merricks's land in that year. The forms included a demand for information relating to the total arable acreage of the farm; that is not a demand "relating to potatoes." If the information demanded as a composite whole exceeds that to which the board is entitled, the whole demand is void, even if only one part of it is bad. It is not severable. The recipient of a demand should not be given the task of going through it and choosing the parts he ought to answer. A prerequisite of the offence is that the demand is a proper one. Any general considerations of severability are inapplicable because the demand serves as a basis for criminal proceedings.

B. J. M. MacKenna Q.C. and *R. I. Threlfall* for the board. Under the Acts the chairman cannot be paid by anyone other than the board. If Parliament wanted him to be paid, it must have intended that he be paid by the board. It is reasonable to infer that the chairman should be paid for his services. "Independent" must therefore be interpreted in a sense different from financial independence. It can mean someone not generally subject to the control or authority of the board. It may refer to the attitude of a barrister exercising a quasi-judicial function, and mean a person with an independent approach; or it may mean someone who has no connexion with the industry.

Parliament must have intended the levy to be determined on an acreage basis. The power to inspect would be rendered largely ineffective if it did not carry the incidental power to measure. Similarly, where the board wished to verify a producer's return and it had no right to measure, it would have to take the risk of a court action. By that time the potatoes may have been removed from the land. Where the producer does not render any return, the power to measure provides an effective remedy. The provisions of the scheme relating to voting depend on acreage. Votes are given with reference to each 10 acres. A dispute about the number of votes to which a producer is entitled can only be resolved by accurate measurement. The right to be exempt from registration under the scheme depends on having less than an acre. The extent of acreage is thus very important in the working of the scheme; having regard to the purpose of the power of inspection and the structure of the scheme, the right to measure is a natural incident of the right to inspect.

[DEVLIN J. You need not trouble about questions (3) and (4).]

The demand of October 3, 1957, was said to be invalid because in asking the total arable acreage it required too much. It is unfortunate that this point was not raised before the committee and put to the witnesses. The board's witnesses could have explained the relationship between the total arable acreage of the farm and potatoes. The point not having been taken is not open.

[DEVLIN J. The form itself either shows the relationship or you must prove it.]

That imposes a hard burden on the board. In any event the form is not vitiated because one part of it may be bad; it is severable. In *Pannell* v. *City of London Brewery Co.*[6] a notice under section 14 of the Conveyancing Act, 1882, was held to be valid though some of the breaches of covenant alleged in it had never occurred. It could be said that it was intolerable that a tenant should have to decide what is a breach. Reliance is placed on that case.

Percival in reply. The view that Parliament intended the chairman to be paid is based on a false premise. Many judicial offices are held without payment. Had payment been contemplated, Parliament would have made express provision for it.

It is not right to say that the omission of the power to measure renders the power to inspect ineffective. It is still effective in relation to storing, packing and marking.

Where a demand is unlawful in a material particular the whole demand is void if it affects the liberty of the subject. In *T. Haythornthwaite & Sons Ltd.* v. *Kelly*[7] a part of a precept made under the Income Tax Act, 1918, was bad, and that was one of the taxpayer's grounds for refusing to comply with the precept. In *Guillemard* v. *Silverthorne*[8] the lessor in a notice under section 14 of the Conveyancing Act, 1882, set out covenants which were not in the lease. The notice was held bad in toto. When dealing with a criminal or quasi-criminal offence the doctrine of severability does not apply.

B. J. M. MacKenna Q.C. *Guillemard's* case[8] is not a comparable one. If the wrong covenants are specified there is simply no compliance with the old section 14. An analogy to that would be if a demand set out the wrong paragraphs of the scheme.

Cur. adv. vult.

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[6] [1900] 1 Ch. 496; 16 T.L.R. 152.

[7] (1926) 11 T.C. 657.

[8] (1908) 99 L.T. 584.

June 18. DEVLIN J. read the following judgment. This is a special case in which a disciplinary committee of the Potato Marketing Board states seven questions of law arising out of their decision to impose penalties on Jack Merricks, who is a producer of potatoes at Lodgeland Farm, Ruckinge, near Ashford, in the County of Kent. The charges against Merricks were that on September 26, 1957, he obstructed officers of the board in their attempts to check the acreage of potatoes grown at his farm, and that on October 3, 1957, he failed to comply with a demand requiring him to furnish to the board information relating to potatoes planted in 1956 and 1957.

The first question stated raises matters which go to the jurisdiction of the committee. Strictly speaking, as Mr. MacKenna has pointed out, an objection to the jurisdiction should be taken by way of motion to set aside the award; but, since the facts which do or do not give rise to the jurisdiction are not in dispute, the point is a technical one and he does not take it. I hold that the committee had jurisdiction. Mr. Percival, who appears for Merricks, has not pursued before me the first objection to the jurisdiction because he says that he is precluded from doing so by authority binding upon me. His second objection is based upon the admitted fact that the chairman of the committee was paid by the board a fee for his services and so is not, Mr. Percival contends, "independent" within the meaning of the legislation whereunder the committee derives its powers. I shall at the end of this judgment give my reasons for holding that this contention is unsound, but I shall consider in the first place the main matters which have been developed in argument before me. These raise the questions whether power to "enter and inspect" includes a power to check or measure acreage and whether in the forms of demand, which the board sent out, they were asking for information to which they were not entitled.

The Potato Marketing Board was created under a scheme made by virtue of the Agricultural Marketing Acts, 1931 to 1949. The Act of 1931 provides for the preparation of schemes for regulating the marketing of agricultural products, and sections 5, 6 and 7 specify a number of matters for which the scheme may provide. These include provisions "for empowering any person authorized "in writing by the board, for the purpose of securing compliance "with the scheme, to enter and inspect, at any reasonable time "and on production of his authority, any part of the land or "premises occupied by any registered producer (being a producer "specified in the authority) which the person so authorized has "reason to believe is used for producing the regulated product or "for doing any of the following things which is regulated by the "scheme, that is to say, grading, marking, packing, or storing "the regulated product or adapting it for sale" and "for requiring "registered producers to furnish to the board such estimates, "returns, accounts and other information relating to the regulated "product as the board consider necessary for the operation of "the scheme."

Section 6 (1) (*d*) says that the scheme shall provide for securing that any producer who is aggrieved by any act or omission of the board may refer the matter to arbitration. Section 7 (1) says that the scheme shall provide for the establishment of a fund to be administered and controlled by the board and for the payment by producers of contributions to the fund of any such amount as may be necessary for the operation of the scheme and for the assessment of contributions in such manner as may be provided by the scheme.

Section 5 of the Act of 1949 requires the scheme to set up a disciplinary committee of the board, consisting of between four and six members of the board and a chairman who is not a member of the board but is an independent person who is a barrister, advocate or solicitor of not less than seven years' standing. Decisions of the committee are taken by a majority, and section 8 applies to those decisions the provisions of the Arbitration Act, 1934, which require a case to be stated if requested. Section 6 allows the committee, in addition to the imposition of penalties, to award compensation for any loss the board has sustained, for example, by failure to collect contributions, and to arrive at such sums on the basis of an estimate presented by the board.

The Potato Marketing Scheme, 1955, provides for all these matters and in most of them it follows almost exactly the relevant wording of the statutes. The power of entry and inspection is given in paragraph 82 (1) of the scheme and in the same words as those used in the statute, and paragraph 81 (1) follows the words of the statute in allowing the board, whenever they consider it necessary for the operation of the scheme so to do, to serve on any registered producer a demand in writing requiring him to furnish to them such estimates, returns and other information relating to potatoes as may be specified in the demand. The power to raise contributions is exercised by paragraph 84 of the scheme, which provides that the board may from time to time by a prescriptive resolution require the contribution of sums which are not to exceed 20s. per acre of the acreage of potatoes planted by the registered producer. At all material times there was in force a resolution requiring each producer to contribute £1 per acre. Paragraph 83 (2) of the scheme sets up the disciplinary committee in accordance with the Act of 1949. Paragraph 83 (3) of the scheme preserves in relation to the decisions of the disciplinary committee the right of arbitration given by section 6 of the Act of 1931, so that a producer who is aggrieved by a decision of the committee has the choice either of requiring the committee itself to state a case or of referring the whole matter to an arbitrator to be determined by him afresh. Merricks did not in this case exercise his right of choice and in fact the case stated by the disciplinary committee was at the request of the board. Finally, paragraph 83 (1) (*a*) creates the two offences with which Merricks was charged, namely, failing without reasonable excuse to comply with a demand or requirement made by the board in pursuance of paragraph 81 of the scheme (that is, the demand for particulars relating to his potato acreage) and, secondly, obstructing or interfering with any person duly authorized by the board to enter and inspect his land and premises.

The headquarters of the board in London are under the direction of a registrar, and the board also employs divisional supervisors. The supervisor for the division in which Merricks farms is one Grimmer. Merricks did not grow any potatoes in 1956, but he did in 1957, and on August 14, 1957, Grimmer observed the crop. The case states that the board had not been informed by Merricks of the acreage of his crop, though it does not appear whether any demand for information was served upon him before October 3, 1957. At any rate, on August 15, 1957, Grimmer made a report to the board, which shows that he regarded Merricks as a defaulter and that he estimated his potato acreage at 25½ acres. On August 23 Grimmer wrote to Merricks saying that he was instructed by the board to check his potato acreage. On September 13 Grimmer went to the farm together with a chartered surveyor who was equipped with measuring poles and a chain. It is plain that Merricks had grievances against the board with which this dispute is in no way concerned, and that he was disposed to show his resentment by standing on all his rights. He objected to a measuring pole being placed on his land. The board's party withdrew to a local public-house where they were joined by Merricks a little later for a pleasant discussion about politics and agriculture—an episode which earned Grimmer a rebuke from headquarters for fraternizing. The campaign was resumed on September 26. On this occasion, Grimmer read his authority to enter and inspect and Merricks said that he was advised that it did not include authority to measure. A pole was inserted and Merricks, after expressing his regret in suitable terms, removed it. The ceremony was repeated and this time Merricks, perhaps for the benefit of the press photographers, who were in attendance, cast the pole across a ditch. There was then a production of a measuring chain, to which Merricks objected, and the board's party then retired. This affair on September 26 constitutes the obstruction with which Merricks was charged. Thereafter, on October 3 Grimmer wrote to Merricks enclosing the board's forms demanding a return of his potato acreage for 1956 (although, as Grimmer knew, Merricks had not in that year grown any potatoes) and 1957. On October 8 Merricks replied that the board was not entitled to its demands, and this is the basis for the other offence with which he is charged.

The second question in the case (the first is the one relating to jurisdiction) inquires whether paragraph 82 of the scheme, which confers the power of entry and inspection, confers also the power to measure land. Mr. Percival has submitted that powers of entry and inspection, because they are an interference with the right of property, should be narrowly construed. But interference with rights of property is now such a common result of legislation that I do not think it is sensible to attribute to Parliament any special reluctance in the grant of such powers. I think that provisions of this sort should be construed in the same way as any other provisions and a fair and full meaning given to the words used. At the same time, if the board has gone beyond the powers which a fair construction of the words confers upon it, it does not matter that it has done so in a small particular, which most people would consider unimportant or harmless. Whenever a man claims to enter another's land without permission, there is a principle at stake.

It is, of course, undisputed that before determining the limits of the power that Parliament has conferred, one must have regard to the objects and scope of the legislation, in which they are contained. These powers are contained in a scheme which provides for contributions to be made according to acreage. Inevitably, therefore, anyone inspecting the land on behalf of the board must want to check the acreage; and it seems at first sight unreasonable to construe the words in such a way as to permit a rough check by eye and forbid an accurate one by measurement. But Mr. Percival has advanced an argument which greatly weakens the force of this contention.

While conceding that one must have regard to the objects of the power as ascertained from the legislation as a whole, he begins with a submission that a power to inspect, unless extended by reference to its objects, does not in its natural meaning include the power to measure. He fortifies this submission by citing a number of statutes in which a power to measure is expressly granted in addition to a power of inspection. He relies also upon the language used in *Mutter* v. *Eastern and Midlands Railway Co.*[1] where the Court of Appeal held that a power to inspect a register included a power to take copies. But in the language of Lindley L.J.[2] the power to take copies was justified as something incidental to the power of inspection because without it the right of inspection would be illusory. Mr. Percival argues that the board can succeed only if they can show that a power to measure is necessary in order to achieve the presumed object of the inspection.

He then submits that the object of the inspection must be ascertained by looking at the Act rather than at the scheme. The conferment of the power in paragraph 82 (1) of the scheme is done in words which follow almost exactly those used in the authorizing section of the Act, and the power conferred cannot be construed as any wider than the power authorized. There is nothing in the Act to show that, when authorizing the power of inspection, Parliament had it in mind that it might be used for the measurement of land or for the checking of acreage. Section 7 (1) of the Act allows contributions from producers to be assessed in such manner as may be provided by the scheme. The framers of the Potato Marketing Scheme chose to assess contributions by reference to acreage. They might equally well have done it by reference to the tonnage of potatoes harvested or sold. There are many agricultural products within the scope of the Act in respect of which contributions could not be assessed on an acreage basis; for example, milk and eggs. Mr. Percival asserts that in the several schemes prepared under the Act the Potato Marketing Scheme is in fact the only one in which acreage is relevant. If, he submits, Parliament had intended that the power of inspection should be used as a means of determining the exact contribution due from any producer, Parliament would not have limited the power, as it has done, to the inspection of land but would have allowed all commodities produced to be inspected and checked for quantity.

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[1] (1888) 38 Ch.D. 92; 4 T.L.R. 377.

[2] 38 Ch.D. 92, 105, 107.

In any event, Mr. Percival denies that a power to measure as well as to inspect is necessary for the effective working of the scheme. I think it is true that the scheme could be made to work satisfactorily enough without the power to check acreage. Paragraph 5 (1) provides that a part of an acre is to count as a whole, so that there is no need for exact measurement in poles, perches or roods. The producer is obliged to declare his acreage under penalty of prosecution for any deliberate or reckless misstatement. An inspection without measurement can check whether the declaration is approximately correct. If the producer fails or refuses to declare his acreage, the board can estimate it and recover the contribution on the basis of the estimate unless it is displaced. It is under powers analogous to these that the income tax laws are satisfactorily worked, without the power of entering upon a tradesman's premises and going through his books. Presumably the other schemes under the Acts are made to work without the power to check the quantity of the products concerned.

I have given to all these arguments the most careful consideration, which indeed they deserve. But in the end and after hesitation, I have come to the conclusion that the more general arguments presented by Mr. MacKenna ought to prevail. I do not think it is possible to draw a hard and fast line between a power to inspect and a power to measure. I have to answer the question addressed to me in the light of all the facts set out in the case; and substantially the question is whether, in doing what they did, the board's officials went beyond what can reasonably be termed inspection of land. I do not say that every sort of measurement of land is authorized by a power to inspect land, but some forms of measurement must be. An inspector cannot be prevented from walking or become a trespasser because he counts his paces. The question is one of degree, and in the end it comes down to this: If a man is authorized to inspect land and he takes measuring instruments with him and he uses them in the ordinary way to get an accurate idea of the size of the land as a whole, can he reasonably be regarded as a trespasser? I do not think he can. I think that power to inspect land must, unless the contrary is indicated, include the power to survey, and this in reality was all that was being done here. Thus, whether the checking of acreage was contemplated or not—and, for my part, I think that Mr. Percival has made good his point that the scheme should not be construed as if it were—the words used in the scheme are wide enough to permit it.

The third and fourth points can be taken together and they deal with the propriety of the board's acts, granted that they are within the letter of the scheme. Paragraph 82 (1) of the scheme provides, as does the Act, that the power of entry may be used only " for the purpose of securing compliance with the scheme." It is submitted that measuring the acreage was unnecessary for this purpose. There seems to be no doubt that proceedings could have been taken quite satisfactorily without the inspection. Without it, the board could easily have formed—and in fact formed—an estimate of the acreage which was sufficient to enable them to recover what was due, together with appropriate penalties for the failure or refusal to declare the acreage. The officials of the board who were called before the committee said that the inspection was made on the instructions of headquarters and were not themselves able to say why it was thought to be necessary. Grimmer said, in his opinion, it was unnecessary but that his headquarters had a different opinion. Mr. Percival submits that the real object of the inspection was to make a display of bureaucratic power and to bring Merricks to heel.

I do not think that the words " for the purpose of securing " compliance with this scheme " do more than express a limitation which is implied upon all statutory powers of this sort. Statutory powers are always coupled with statutory duties and the powers must be used only for the purpose and with the object of discharging the duties imposed. It is for the authority to whom the power is granted and upon whom the duty is imposed to decide in the first instance what steps it is necessary to take under the power for the achievement of the object; the exercise of its discretion in making that decision will not be reviewed by the courts and the decision itself will be impugned only if an abuse of power can be shown. I adopt what has recently been said on this point by Barry J. in *Barber* v. *Manchester Regional Hospital Board*[3] and follow, as he did, the authority of the cases to which he refers. The burden of proving bad faith or the like is upon the person asserting it.

The action of the board in this matter may be criticized as unnecessarily heavy-handed. But there is no sign of bad faith; and if the board wanted to be on the safe side and obtain a professionally accurate measurement, that cannot be said to be wholly without reason. There is not in the case any express finding of fact on this point based on the whole of the evidence.

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[3] [1958] 1 W.L.R. 181, 193; [1958] 1 All E.R. 322, 329.

I imagine that the committee, which except for the independent chairman consisted entirely of members of the board, may have found themselves in some difficulty in passing judgment upon what was in the mind of the board as a whole. What they have stated is simply that they infer that the attempt to measure was made for the purpose of securing compliance with the scheme. I take this to mean that they inferred from the doing of the act without more, or presumed, that it was done for a proper purpose and that they found no evidence to rebut that presumption. Such an approach would be correct in law and such a finding would, I think, be unimpeachable. But in any event I am prepared to hold that, the burden of proof being on Merricks, he produced no evidence of impropriety. I therefore answer the third and fourth questions in the affirmative.

I turn now to consider the validity of the demand for information served on Merricks on October 3, 1957, which is the subject-matter of the fifth question. The demand is contained in four documents, two of them (Merricks had apparently two farms) relating to the 1956 crop and two relating to the 1957 crop. These forms require the producer to state to the nearest quarter of an acre the acreage of each variety of potato, then to state the acreage of all the potatoes and finally to state the total arable acreage of the farm. The chief attack on the validity of the demand is that the board has no power to require information under the last head about the total arable acreage of the farm. I have not had to consider whether it is reasonable or unreasonable for Merricks to refuse this figure any more than I have had to consider whether it is reasonable or unreasonable of him to have objected to the measurement of his land. The board have demanded the information, not as a matter of courtesy, but as of right and under threat of penalties, to which they draw attention in large type, and they must prove their right. They have the right under paragraph 81 (1) to demand information "relating "to potatoes." I cannot see how information about the acreage of land upon which ex hypothesi potatoes are not being grown can be information "relating to potatoes." At any rate, the relationship is not apparent; and if there is a connexion which could be shown by outside evidence, it is for the board to adduce such evidence, which they have not done. I can quite see that in the operation of the scheme, or at any rate for the purposes of the trade, it may be useful to the board to know what proportion of his total arable acreage each producer devotes to potatoes, but they are not empowered under paragraph 81 (1) to demand information simply because it is useful for the operation of the scheme. The power to obtain, and use such information if they can get it, is given under paragraph 79 and this is to be contrasted with the more limited class of information which they can get under threat of penalties by virtue of paragraph 81 (1).

But it does not follow that because a composite demand asks in one particular for information, to which the board is not entitled, that the demand as a whole is invalid, with the result that no part of it need be complied with, good or bad. There does not appear to be any authority on the point whether a demand is in such circumstances invalidated. I must, therefore, find the right answer as a matter of principle, and I think that the principle to be applied is that which is applied to all classes of documents which are partly good and partly bad because, for example, they are in part illegal or ultra vires. In all these cases, the question to be asked is whether the bad part can be effectively severed from the good. I think that the demand relating to total arable acreage of the farm can be struck out from the form without altering the character of the rest of it. Accordingly, I hold that Merricks, while not bound to supply that particular piece of information, was in breach of the scheme by ignoring the rest of the form, and I answer the fifth question in the affirmative. I do not wish thereby to give any encouragement to authorities like the board to fill up their forms with questions which they are not entitled to ask, reckoning that it is the recipient's business to sort out the good from the bad. The sender of the form knows or ought to know exactly what his powers are; the recipient rarely does and may find it more of a nuisance to go and look them up than it is to go and get the bit of information required. The board can fairly be criticized for being careless in the exercise of its powers; and because of this, and because of the quasi-criminal character of the matter, Mr. Percival has invited me to treat the demand as in some way tainted and so wholly unenforceable. If there were a deliberate abuse of power, it might be so. But I see no evidence of that and I think, therefore, that the ordinary principle of severability should be applied.

I need not take up much time over the last two questions. The sixth involves only a finding of fact and no argument has been pressed on it. The seventh involves the same considerations as those I have already dealt with in answer to the third and fourth. It is said that the demands were unnecessary because the board was already aware from Grimmer's observations of the acreage of potatoes grown in 1957 and they were also aware that no potatoes had been grown by Merricks in 1956. But they might reasonably have thought it desirable to have their information confirmed by Merricks himself and I see no grounds for interfering with the finding of fact that the board considered the information necessary for the operation of the scheme.

As the result of the answers I have given, I uphold the awards of the case stated. Under these awards a penalty of £50 is imposed upon Merricks for his acts of obstruction; and for failing to comply with the demand for information there is a penalty of £20 and also an award of £25 representing the contribution due in respect of the 1957 acreage of potatoes. These penalties of £50 and £20 respectively might be thought excessive, if the view is held that Merricks had genuine grounds—even though after consideration they are found to be insufficient—for challenging the legality of the board's acts. I have no jurisdiction whatever over the amount of the penalties and no cause for commenting upon them except in so far as the comment draws attention to matters of law. It appears to me that these very substantial fines may have been inflicted because the committee took the view that there was nothing whatever in the legal objections taken by Merricks and his advisers and that the argument about them was merely an extension of a policy of unreasoning obstruction. I have made it plain that that is not my view of the arguments to which I have listened. In particular, I held that the demand for information made by the board was partly bad; and the question whether Merricks was bound to comply with it has turned out to be a novel one on which no direct authority could be cited. Whatever may have been the motive for Merricks' attitude, as things have turned out he has done no disservice to the body of producers, who are the board's constituents, by having these matters clarified. If an application is made to me for the purpose, I am prepared to consider whether I have power to remit these awards to the committee in order that they may determine, the matter being entirely for them, whether in the light of this judgment the penalties remain appropriate.

I must now state my reasons for holding that the committee had jurisdiction for determining this dispute. What is meant by "a chairman who is not a member of the board but is an independent person who is a barrister of not less than seven years standing. . . ." ? Mr. MacKenna submits that the clause "who is not a member of the board but is an independent person" is to be read as constituting one requirement and that the second part of it is there only to emphasize what is the essence of the requirement, namely, that the chairman is not to be a member of the board. I cannot accept this construction. I think that the provision that the chairman is to be independent adds something; for example, I think that a competing producer might be held not to be independent. I agree with Mr. Percival that independence ordinarily denotes financial independence, but I do not think that is the only sense in which the word can be used. I think that the word may be used to refer to a person who is permitted—and perhaps indeed required—by the man who employs or retains him, to bring an independent mind to bear on a particular problem; for example, a solicitor. The term "independent contractor" conveys what I mean. I have no doubt that it is in this latter sense—independent in the sense of being detached and not in the sense of being unpaid—that the word is used in paragraph 83 (2) (*a*) of the scheme; and I have two reasons for so thinking. The first reason is that Parliament by the Act of 1949 has imposed upon the board the duty of setting up a disciplinary committee with an independent chairman. It follows that the board must have the duty of paying the chairman a fee if he requires one. Mr. Percival was driven to argue that the board could discharge its duty only by finding a chairman who would give his services free, but I do not think that Parliament can have meant to narrow the choice in that way. The second reason is that the disciplinary committee is not an independent tribunal in the full sense of the word. If it were, it would no doubt be surprising to find that the board, which must always be one of the two parties appearing before it, was expected to pay the chairman. But this tribunal set up pursuant to the Act of 1949 (which does not, it must be remembered, exclude the right to a wholly independent arbitration) is a committee of the board itself. If the independent chairman were to differ from the other members of the board, who sit on the committee, he could easily be outvoted. Since this is the chairman's position, it is ridiculous to suppose that it can matter much that he should be paid a fee by the board. I think that what is contemplated is that the chairman should be a person who will be able to bring an entirely independent mind to bear on any case that is presented to the committee and who, because of his legal experience, will be able to guide the committee and ensure that they approach the cases which they have to decide in a true judicial spirit. Accordingly I hold that, notwithstanding that its chairman received a fee from the board, the committee was properly constituted under the provisions of the scheme.

Award affirmed.

Argument was then addressed to the court on the jurisdiction of the court to remit the award to the committee.

Devlin J. In this matter, Mr. Percival has, pursuant to an intimation which I gave in the course of my judgment that I would entertain such an application, applied to me to remit this award to the disciplinary committee of the Potato Marketing Board in order that they may reconsider, in the light of the principles of law which I expressed in my judgment as being the correct ones, the assessment of penalties which they imposed upon Merricks. He makes that application under section 22 of the Arbitration Act, 1950, which is in wide terms and gives power to the court in all cases of reference to arbitration to remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire. While there is that wide discretion given to the judge, it is a discretion which has to be judicially exercised; and, if I had entertained the exercise of it in this case, I should have wanted to consider the matter very carefully, and I should have given to Mr. Percival an opportunity of drawing my attention to some of the authorities that might be relevant. But I do not think that my discretion arises at all, because Mr. MacKenna has satisfied me that section 22 does not apply to this award and I have no power to remit this award. He submits that this is not an arbitration in the full sense of the term; it is not an arbitration to which all the provisions of the Arbitration Act, 1950, apply; it is only made an arbitration, or made akin to an arbitration, for very limited purposes by section 8 of the Agricultural Marketing Act, 1949. That section refers to sections of the Acts of 1889 and 1934 which are no longer part of the law; but, paraphrased, it provides that sections 21 and 26 of the Arbitration Act, 1950, "shall apply in relation to the hearing "and determining of the matters which by virtue of any of the "preceding provisions of this Act are referred to the disciplinary "committee of a board as if the proceedings were an arbitration "under a submission to which the board and the producer were "parties and as if the disciplinary committee were the arbitrator "or umpire under the submission." In truth, then, this is only a quasi-arbitration; "as if" are the operative words in the section. Two sections of the Act are specifically applied, and section 22 is not one of them. Therefore, prima facie, I have no power to make any order which would derive its virtue from section 22.

Mr. Percival has submitted that because section 21 applies, which is the section which deals with the stating of a case in the form of a special case for the decision of the High Court, therefore those sections which he submits are ancillary to it, of which section 22 is one, must (although not specifically mentioned in section 8 of the Act of 1949) be taken by implication to apply, as otherwise the court would be bereft of the powers which it would have to have in order to deal with such matters adequately. One point in support of that occurs to the mind at once. Suppose the court thought that the case and the facts had not been sufficiently stated. Could it not, in such circumstances, follow the usual course of remitting the award to the arbitrator in order that he might state the facts which were necessary, so that the decision of the court could be given? Mr. MacKenna has answered that satisfactorily to my mind by saying that that power is not strictly (although it is not generally necessary to consider it strictly) derived from section 22; it is derived from section 21, which says: "An arbitrator . . . may, and shall if so directed by the High "Court, state (*a*) any question of law arising in the course of the "reference . . ."; and he submits, I think rightly, that there must be power under that section, if the case is not adequately stated, for the court to direct a further statement of the case to be made.

The other sections that are, as Mr. Percival puts it, ancillary are all sections of the sort, so far as I have been referred to them, which give the court powers to deal with what is sometimes called misconduct on the part of the arbitrators, in order to see that justice is done, if the arbitrators are biased or otherwise misconduct themselves in the technical sense. Again it would be surprising, if this were an ordinary arbitration, if no provision were made for the court to have such powers. Mr. Percival submits that they must have such powers and that that must include the power to remit in proper cases under section 22 (1) in order that justice may be done. But I see no reason in this case to say that section 8 is not by itself quite adequate for the purposes which Mr. Percival has in mind, because this is not a final arbitration or a final decision on the facts. Paragraph 83 (3) of the scheme—and this paragraph is there by virtue of statutory provisions—permits, in effect, that any decision given by the disciplinary committee can be questioned by the producer by his giving notice to the board referring the matter to arbitration

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under the provisions of the scheme and that, if the matter is so referred, no proceedings should be taken by the board otherwise than for the purposes of the arbitration. The right to independent arbitration that is given by the Acts under which the scheme is made is preserved, and this award of the disciplinary committee is not, therefore, a final decision on the facts. If it is right to question it on any grounds, whether on the grounds of irregularity or technical misconduct or because the penalties are thought to be excessive, that can be done by the producer taking action under paragraph 83 (3). There is no need, therefore, to read into section 8 anything that is not there, and there is no reason to suppose that the framers of section 8 did not consider that it was quite adequate for the purposes they had in mind, that sections 21 and 26 only of the Arbitration Act, 1950, should be applied, and that there was no necessity to apply section 22.

For these reasons, I think that Mr. MacKenna is right in submitting that I have no power to remit this case. Accordingly, I refuse the application.

Application refused.

Solicitors: *Collyer-Bristow & Co. for Elliott & Gill, Hastings; Ellis & Fairbairn.*

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July 30, 31.

Diplock J.

KIRKHAM *v.* BOUGHEY.

[1955 K. 1329.]

Damages—Personal injuries—Husband and wife—Choice of husband not to return to work abroad while wife incapacitated—Choice reasonable—Employment in England at lower wage—Whether husband entitled to loss of earnings during period of wife's incapacity.

The plaintiffs, husband and wife, sustained injuries as a result of a motor accident on September 10, 1955, caused by the negligence of the defendant. The wife sustained severe injuries and was detained in hospital until February 1, 1956. The husband, who sustained only trivial injuries, was due to return to his employment in Africa at the end of September, 1955, but he decided, because of his anxiety for his wife and the problem of caring for their two children, not to return, and he took employment in England at a substantially lower wage:—

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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Held, that although it was reasonable for the husband to remain in England from September, 1955, until about March, 1956, he was not entitled to recover as damages his loss of earnings during that period.

Best v. *Samuel Fox & Co. Ltd.* [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394 followed.

Behrens v. *Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1; [1957] 1 All E.R. 583 questioned.

ACTION.

The following statement of facts is taken substantially from the judgment of Diplock J.: The plaintiffs, Thomas Joseph Kirkham and his wife Nora Kirkham, were injured when a motor-car driven by the defendant collided with the vehicle in which the plaintiffs were travelling. The defendant admitted liability for the accident, which occurred on September 10, 1955. The wife sustained severe injuries and was in hospital from the date of the accident until February 1, 1956. On her return home she was able to do light housework, and by August, 1956, could do most of the housework. The husband, who sustained trivial injuries, was a lift erector and he had for some time before the accident been employed in Nigeria at a salary of £30 a week together with living expenses at the rate of £35 per month, this allowance just covering his additional expenses of living in Lagos while his wife and two children, aged four and seven, continued to live at their home in Chessington, Surrey. At the time of the accident he was at home on a month's leave which expired at the end of September, 1955. Had there been no accident he would have resumed employment in Nigeria for his employers on an 18 months' tour of duty at the same wages. After the accident the husband went with his children to Birkenhead where he stayed so as to be close to his wife who was in hospital in Oswestry. On returning to Chessington in October he informed his employers that he could not think of returning to Africa then, and the only reasons for his refusing the work which was available to him in Nigeria at that date were his anxiety for his wife and the problem of caring for the children. The husband's injuries were not a contributing factor.

After his return to Chessington the husband made no attempt to find work in England until the end of November, when he took a job locally as an electrician at £8 a week. He continued with the local job until August, 1956, when he obtained work as a lift erector in London at £13 10s. a week. At any time between October, 1955, and September, 1956, he could have returned to work for his employers in Nigeria, and even after September, 1956, he could have obtained work in Africa at the same wages as before with other employers.

By his statement of claim the male plaintiff claimed, inter alia, loss of earnings at £30 per week plus free accommodation from November 2, 1955, and continuing. He made no claim for damages for loss of consortium.

John Harington Q.C. and *Michael Lee* for the plaintiffs.
Hugh Griffiths for the defendant.

The following case was cited in argument * in addition to those referred to in the judgment: *Burgess* v. *Florence Nightingale Hospital for Gentlewomen.*[1]

DIPLOCK J. This action arises out of a motor accident which occurred on September 10, 1955. Liability is now admitted and the only matter for me is to quantify the damages recoverable.

There are two plaintiffs, Thomas Joseph Kirkham and Nora Kirkham, his wife. The wife, who is now aged 35, was thrown out of the car and, as a result of the collision, the car rolled over and crushed her, and she suffered severe injuries. [His Lordship referred to the wife's injuries, assessed the total damages to which she was entitled at £1,785 18s. 2d. and continued:] The male plaintiff sustained trivial injuries—a cut on his head, bruised ribs—and I estimate the general damage at £40. His special damage, apart from one item, is agreed at £215 10s. 7d. This special damage is claimed under such headings as cost of domestic help, looking after the two children aged seven and four during the wife's absence, for property lost and for expenses in connexion with visits to the wife at the hospital. I do not know how the agreed figure is made up. Agreement was reached, on my suggestion, to save costs, and if the figure does include a sum for the expenses of visits by the husband to the wife, it is not to be regarded as a concession by the defendant that such expenses are recoverable as a matter of law, and I have heard no argument on the part of the defendant as to this.

What has been argued, and what I have to determine, is whether, as a matter of law, damages claimed under the head of loss of earnings by the husband are recoverable. [His Lordship stated the facts relating to the husband's actions after the accident, held that the only reasons for his not returning to work in Africa were his anxiety about his wife and the problem of caring for the children, and that work at the same wage was at all material times available to the husband, and continued:] In these circumstances Mr. Harington submits that the plaintiff is entitled to receive as damages a sum representing the difference between the £30 per week, which he could have earned in Africa, and the amount per week which he in fact earned in this country, for so long a period as I am satisfied that it was reasonable for him to refuse to go to Africa because of his anxiety as to the condition of his wife and the problem of looking after the children during his wife's absence and subsequent partial incapacity.

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* It is regretted that it is not possible to publish any argument in this case, since the learned reporter has retired from the Bar and burnt his notebooks.

[1] [1955] 1 Q.B. 349; [1955] 1 All E.R. 511.

It was argued for the defendant that, even if the plaintiff's course of action was reasonable—which is not conceded as respects the period after his wife's return home on February 1, 1956—this kind of damage was not recoverable in law. It is damnum absque injuria or, as would have been said before *Bourhill* v. *Young*,[1] it is too remote. "Injuria" connotes duty—in this case a duty to take reasonable care—owed by him who causes the "damnum" to him who sustains it. Prima facie that duty is owed by the driver of a vehicle on a public highway only to those whose persons or property are in geographical proximity to the driver. That his carelessness in causing personal injuries to one person to whom the duty to take reasonable care is owed has the inevitable consequence of causing damage to another person does not, of itself, give that other person a right to recover those damages from the original tortfeasor; he must show some legal duty owed by the tortfeasor to himself. Thus, as was pointed out by their Lordships in *Best* v. *Samuel Fox & Co. Ltd.*,[2] a servant who loses lucrative employment because his master is injured in a road accident cannot recover damages against the driver whose negligence caused his master's injuries.

Mr. Harington has argued that the circle which encloses those to whom the driver owes a duty to take care is not a mere geographical circle, but extends to the family circle of those who find themselves within the geographical circle, and he does not shrink from the proposition that if a daughter or a sister gives up lucrative employment to nurse an injured father or brother she would have a cause of action against the driver provided only that the court was satisfied that in the circumstances it was reasonable for her so to do. This extensive proposition, not limited to any special relationship which may in law exist between husband and wife, is unsupported by authority and in direct conflict with the dicta and, possibly, the ratio decidendi in *Best* v. *Samuel Fox & Co. Ltd.*[2] However commendable may be the sacrifice made by the relative of the injured person, she has, in my opinion, no remedy in law against the driver of the vehicle which caused the injuries, because the driver owes no duty to her.

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[1] [1943] A.C. 92; [1942] 2 All E.R. 396.

[2] [1952] A.C. 716, 731, 734; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

Is the husband of an injured wife in a different position from any other relative? In one respect at least he is, in that the common law recognizes his right, in the nature of a proprietary right, to consortium, and to this extent the circle of those to whom the driver of a vehicle on the highway owes a duty is widened to include the husband of a married woman who is present on the highway. The husband can, therefore, recover damages against the driver even though the husband was a hundred miles from the highway when the accident took place. But what damages can he recover? To this question the quasi-proprietary nature of his right, I think, supplies a clue. He is in the position of one whose property is on, or in proximity to, the highway, and it is for the damage to his proprietary right, the comfort and services of his wife, that he has a remedy.

To this there is one addendum: the husband is entitled to recover the cost of medical treatment, convalescence, etc. It would, I suppose, be possible to relate this to consortium as money expended in mitigating his damage under that head. Alternatively, and this is how Lord Goddard explained it in *Best* v. *Samuel Fox & Co. Ltd.*,[3] the claim may lie in the husband's legal duty to provide proper maintenance and comfort for his wife. With respect, I prefer this explanation, which would extend, not merely to a husband, but to the parent of an injured infant, although here again there may be vestiges of a proprietary right in the parent. It is to be noted, however, that the duty is a legal duty and the liability of the tortfeasor does not extend to one who, however reasonable and commendable his actions or however close his relationship to the injured person, pays for medical treatment which he is under no legal duty to provide.

But the disputed item of special damage does not fall under either of these heads. It is not claimed as damages for loss of consortium; indeed, the particulars do not suggest that the loss of wages was due to any other cause than the husband's own injuries. Mr. Harington repudiates the suggestion that his right to these damages is based on loss of consortium. He submits that, provided I am satisfied that the husband acted reasonably, he must be put in as good a position, so far as money can do it, as if the wrong had not been done to him. But this submission begs the question: what was the wrong done to him? If the husband had not been present at the time of the accident the wrong would have been limited to the injury to his quasi-proprietary right to the consortium of his wife, and it is conceded that the disputed head of damages, as contrasted with the admitted claim for domestic assistance, cannot be claimed under that head. Does it make any difference that in this case the husband was present at the accident and sustained personal injuries himself? While he is, of course, entitled to recover those damages which flow from his own injuries, I do not see how this can enlarge the measure of his damages for the quite separate wrong to his quasi-proprietary interest in the consortium of his wife.

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[2] [1952] A.C. 716.

[3] Ibid. 733.

In principle, therefore, if the matter were res integra I should hold that the loss of wages was damnum absque injuria, and in so holding I am, I think, supported by the dicta of Lord Goddard and Lord Morton of Henryton in *Best* v. *Samuel Fox & Co. Ltd.*[4]

Mr. Harington has, however, pressed upon me two matters. First he says it is well known that husbands are frequently awarded, as part of their damages for injuries to their wives, the cost of visiting the wife in hospital, and such damages have been claimed, and, indeed, agreed, in this case. As I have said, I do not know how the agreed figure of special damage was made up. It was done at my urging to save costs and it would be quite wrong to regard this agreement as conceding that the cost of a husband's visit to hospital was recoverable in law. But I see no difficulty in reconciling the recovery of this item with the principle which I have already discussed. Visits by a spouse may well be a factor in the recovery of a patient, and a visit to a wife in hospital may thus be a proper step in mitigating the damage sustained by loss of consortium by reducing the period during which the consortium is lost. But if the sole justification for the visit is the comfort or pleasure which it gives to the wife, then I think it is not recoverable.

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[4] [1952] A.C. 716, 729, 734.

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BOUGHEY.

Diplock J.

The second matter on which Mr. Harington relies is the recent decision of *Behrens* v. *Bertram Mills Circus Ltd.*,[5] in which, he says, Devlin J. allowed a claim closely analogous to this. That case bristles with points in no way material to this case, but one of the matters dealt with in the judgment was a claim by a husband, who was a midget, to loss of earnings from a joint act which he performed with his midget wife. The wife having been injured seriously and the husband slightly, there was a period during which the husband, although himself capable of continuing to perform with some other partner, did not do so but waited with his wife until his wife's recovery. He claimed loss of earnings during that period of waiting. Devlin J. held that, having regard to all the very exceptional circumstances, it was reasonable for him to do so and awarded damages measured by his loss of earnings during the period of waiting. It is not quite clear to me that the ratio decidendi is not based upon loss of consortium. The sum claimed was a small one and it may well have been that if the husband had gone out on tour the cost of paying domestic assistance, plus the damages for loss of consortium, would have exceeded his loss of earnings by staying at home. If so, it was a proper step to take in mitigation of damages and the loss of earnings would be recoverable.

Mr. Harington argues that the ratio decidendi is to be found not in the passages which deal with loss of consortium, but where the judge says[6]: "But in fact he did not go on tour. He "preferred to stay at home and accept the loss of earnings; and "in the very peculiar circumstances of this case I have held that "his choice was a reasonable one. Can he then recover his loss "of earnings as damages? To hold that he can may be breaking "new ground in this type of action, but I can see no reason in "principle why he should not be thus compensated." Then come the words upon which Mr. Harington particularly relies: "The assessment of damage must be governed by those prin-"ciples which apply generally in the law of tort and, provided "he acts reasonably, he must be put in as good a position, so "far as money can do it, as if the wrong had not been done to "him. I repeat that on the facts this is a most exceptional case, "turning on the exceptional need which this husband had for "the support of his wife as a wife. Because of that I think that "he is entitled to recover."

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[5] [1957] 2 Q.B. 1; [1957] 1 All E.R. 583.

[6] [1957] 2 Q.B. 1, 29.

I, of course, accept that principle, but it depends on what is the "wrong done." I have already given reasons for holding that the only wrong done is the injury to the husband's quasi-proprietary right in the consortium, and if this judgment is to be read as extending the rights of the husband of an injured wife, it is, I think, out of harmony with the speeches of their Lordships in *Best* v. *Samuel Fox & Co. Ltd.*[7] I therefore hold, as a matter of law, that the wages are not recoverable.

The point is, however, a difficult one and I am conscious that I may be differing from the view held by Devlin J. I shall therefore assess the damages on the basis that I am wrong as to my ruling on the law. I do not find it easy to apply a standard of reasonableness to the personal sphere of family affection and to say where sense ends and sensibility begins. I think, however, that I must ask myself the question: Would a normally affectionate and dutiful husband and father, faced with the circumstances with which the male plaintiff was faced, have said to himself: "I must throw up my £30 a week job in Africa and "stay here and comfort my wife and look after the children until "I know that she has recovered sufficiently to do so herself"? I think I must pose that question leaving aside all claim that he may have against some third party to be recompensed for the monetary loss which that decision entails. I ask the question whether a husband, knowing that it was going to make a loss of some £22 a week to him, would have said: "I must make that "sacrifice, it is right to make that sacrifice, to comfort my wife "and look after my children" in the circumstances of this case? He had, he tells me, no relatives who were in a position to look after the children, but I do not doubt that, had he been determined to go out to Africa, he could have found somewhere for the children to have been looked after or someone to care for them.

Nevertheless I am prepared to say that a normally affectionate, dutiful husband and father might properly, in the circumstances, have reached the decision that he should throw up his African job and not go back to Africa until he was satisfied that his wife was sufficiently recovered to come home and look after the children of four and seven years. I do not think it was reasonable of him to wait until the end of November, 1955, before taking a job at all and I do not think there is any doubt that a skilled electrician could have got a job as soon as his leave was ended in October, 1955. I do not think it was reasonable of him, once his wife had returned and once it was plain that she was making a good recovery, to continue to stay at home instead of going to Africa. I have already found as a fact that had he desired to go to Africa a job at the rate of £30 a week would have been available.

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[7] [1952] A.C. 716.

I think, therefore, that if he is entitled, contrary to my view, to recover any damages under this head, the damages should be limited to a period expiring a reasonable time, say a month or so, after his wife's return, and the damages should be based on the assumption that he should have got a local job in October and not in November; that is to say, that his loss during the period would be a loss of £22 a week. Taking those matters into consideration and making a reasonable allowance for his wife's return and for him to get another job, I think the proper figure of damages under this head, if, contrary to my judgment, they are recoverable, would be the sum of £500. The husband is, accordingly, entitled to judgment for £255 10s. 7d.

Judgment for the plaintiffs.

Solicitors: *G. Howard & Co.; A. D. Vandamm & Co.*

1958
June 26.

Barry J.

KELLEHER v. T. WALL & SONS LTD.

[1950 K. No. 1042.]

Evidence—Evidence Act, 1938—"*Person interested*"—*Action for personal injuries—Claim by employee against employer—Documentary statement made by another employee now deceased—Whether a* "*person interested*"—*Evidence Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (1) (3).

A documentary statement which complies in all other respects with the requirements of section 1 of the Evidence Act, 1938,[1] is not necessarily inadmissible in evidence as a statement made by "a person interested" because the maker of the statement is in the employment of a party to the action. In order to decide the question of admissibility, the facts must first be ascertained as to the maker of the statement, the character and subject-matter of the proceeding and the relationship of the maker of the statement thereto.

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[1] Evidence Act, 1938, s. 1 (1): "In "any civil proceedings where direct "oral evidence of a fact would be "admissible, any statement made by "a person in a document and tending "to establish that fact shall, on production of the original document, be "admissible as evidence of that fact" if certain conditions are satisfied, . . .

Subs. (3): "Nothing in this section "shall render admissible as evidence "any statement made by a person "interested at a time when proceedings were pending or anticipated "involving a dispute as to any fact "which the statement might tend to "establish."

In an action for damages for an injury sustained in the course of his employment brought by a chargehand in the production shop of a factory against his employers, the employers sought to tender in evidence a statement made soon after the accident by the then supervisor of the production shop, who had since died:—

Held, that the maker of the statement was so closely associated with the management of the production department, the efficiency of which the plaintiff was calling into question, that he must be treated as "a person interested" within the meaning of section 1 (3) of the Act, and accordingly the statement must be excluded.

In the Estate of Hill [1948] P. 341; [1948] 2 All E.R. 489 applied.

Observations of Asquith L.J. in *Barkway* v. *South Wales Transport Co. Ltd.* [1949] 1 K.B. 54, 60; 64 T.L.R. 462; [1948] 2 All E.R. 460 considered.

ACTION.

The plaintiff, Cornelius Kelleher, was employed by the defendants, T. Wall & Sons Ltd., as a chargehand in the production department at one of the defendants' factories. On April 30, 1956, he was required with two other men to move a heavy fruit pulping machine from one part of the factory to another. When lifting the machine onto a trolley for the purpose of transporting it he sustained an injury to his hand. He brought an action for damages against his employers alleging that his injury was caused by their negligence or breach of duty. The defendants denied liability.

At the hearing of the action the defendants sought to tender as evidence, under section 1 of the Evidence Act, 1938, a statement made by one Atkins, who had been a supervisor in the production department of the factory at the time when the accident took place but who had since died. The statement was one which had been taken from the deceased by a representative of the defendants' insurers some three months after the accident occurred. Objection was taken by counsel for the plaintiff on the ground that the statement had been made by "a person "interested" and was therefore inadmissible.

Stephen Chapman Q.C. and *Alan de Piro* for the plaintiff. The preliminary conditions of section 1 of the Evidence Act,

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1938, are satisfied, and therefore, in relation to this statement, the only question is whether Atkins, who made it, was " a person " interested " within the meaning of subsection (3). The general intention of the section where such a statement is put in evidence is that it should be one made by a person who may conveniently be described as " an independent person ": see *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.*,[2] *per* Morton J.[3] In that case the issue was whether a tester employed by a company to test certain apparatus which they sold, who had signed a proof relating to facts relevant in a passing-off action and had since died, was " a person interested " within the meaning of section 1 (3) of the Act. Morton J., who held that he was, applied the following as " a useful test "[4]: Was it better for the tester that the plaintiffs should succeed in the action or was it a matter of indifference to him? That test is applicable in the present case. An employee of a company which is defendant to an action for negligence may be " a person interested " within the meaning of this subsection although he is not financially interested in the result of the action: *Bain* v. *Moss Hutchison Line Ltd.*[5] In that case shipowners, who were defendants to an action by a widow whose husband had died as a consequence of a fire which broke out in a ship in which he was the purser, sought to put in evidence statements in the form of signed proofs made by the master and officers of the ship. Birkett J., who held that the master and officers were " persons interested," based his decision on the fact that the plaintiff's allegations, if successful, would not reflect favourably on those in control of the ship. He accordingly excluded the statements. In *Barkway* v. *South Wales Transport Co. Ltd.*,[6] where two actions arose out of the explosion of a bus tyre, it was sought to put in evidence in the second action the transcript of evidence given in the first by a tyre-tester employed by the defendants but who had since died. The Court of Appeal decided that the tyre-tester was " a person interested " within the meaning of section 1 (3). Asquith L.J., who delivered a judgment with which Scott and Bucknill L.JJ. agreed, based his decision on two grounds—that the deceased's reputation as a tyre-tester was involved and " apart from that he was interested " as an employee in his employers winning the case."[7] It is submitted that that latter observation is not obiter but is a substantive, although alternative, ratio decidendi of the decision of the court.

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[2] [1941] Ch. 248; [1941] 1 All E.R. 311.

[3] [1941] Ch. 248, 251.

[4] Ibid. 250.

[5] [1949] 1 K.B. 51; 64 T.L.R. 473; [1948] 2 All E.R. 294.

[6] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.

[7] [1949] 1 K.B. 54, 60.

It is conceded that there must be a reasonable limitation on this doctrine, and it is submitted that to be " a person interested " in an action such as the present the employee must be one who had some connexion with the accident: so in *Evon and Evon* v. *Noble*,[8] where a child injured as a consequence of playing with the rubber tube from a carboy of acid on a chemist's premises brought an action through her father against the chemist, and the nursemaid who was in charge of the child at the time of the accident was held to be " a person interested." See also *Cartwright* v. *W. Richardson & Co. Ltd.*,[9] where a chargehand was injured while lowering a tank into a pit by means of a winch, and a statement made by the assistant brakesman on the winch was held to be inadmissible as made by a person interested in an action for damages for negligence brought by the chargehand against the employers.

In the present case Atkins, as second in charge of the department in which the plaintiff was working, was a representative of the defendants, and as such was responsible for ensuring that the work was performed in such a way as not to subject those employed to unnecessary risk. Applying the test laid down by Morton J. in the *Plomien* case,[10] he cannot be regarded, in relation to this accident, as an entirely independent person. Putting it on the broader basis, by this action his management is subjected to criticism, and therefore he is in the position of the tyre-tester in *Barkway's* case.[11] As an employee of the company, who, although not directly associated with the accident, had some concern with the matters relating thereto, he was interested in his employers winning the case. Finally, his position can be likened to that of the assistant brakesman in *Cartwright* v. *W. Richardson & Co. Ltd.*[12] For those reasons it is submitted that Atkins was " a person interested " within the meaning of section 1 (3), and accordingly this statement is inadmissible.

W. L. Mars-Jones Q.C. and *David Stinson* for the defendants. Section 2 of the Act, which deals with the weight to be given to statements admitted under section 1, provides that the court shall take into account the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts. That has a bearing on the question under consideration. As to the meaning of "interested," see Phipson on Evidence, 9th ed., p. 287, which correctly states the law. "Interested" means that there was some possible advantage to be gained by the maker of the statement from making it. The mere fact that Atkins was in the employ of the defendants at the time that he made this statement does not necessarily make him "a person interested" within the meaning of section 1 (3). In every case the facts must be ascertained: see *In the Estate of Hill*,[13] *per* Wallington J.[14] In *Hill's* case[15] the observations of Wallington J., who commented on the decision of Morton J. in the *Plomien* case,[16] clearly show that the true basis on which Morton J. decided the *Plomien* case[16] was that he considered that the position of the tester was such as to give him a financial interest in the result of the proceedings. That cannot be so in the present case. Atkins could not possibly have any financial interest in the result of these proceedings. As to *Barkway* v. *South Wales Transport Co. Ltd.*,[17] the defendants do not quarrel with the proposition that an employee whose reputation is in any way involved is "a person "interested" in an action, but the mere fact that he is an employee of the defendants does not necessarily make him "a "person interested." The second part of Asquith L.J.'s proposition in *Barkway's* case[18] was based on the *Plomien* case,[19] in which the decision was based on the possibility of a financial interest on the part of the tester. Moreover, the *Plomien* case[19] was a passing-off action, an entirely different type of action, which distinguishes it from the present case. *Barkway's* case[20] is also distinguishable on that ground, because there the plaintiff was a passenger of the defendant company by whom the tyre-tester was employed. Here both the plaintiff and Atkins, the maker of the statement, were fellow-employees of the defendants. As to *Cartwright* v. *W. Richardson & Co. Ltd.*,[21] clearly there the brakesman on the winch was so closely associated with the accident to the chargehand as to make him "a person interested." In Atkins' case the position is quite different, because he was nowhere near the scene of the accident when it occurred. [Reference was also made to *Holton* v. *Holton*[22] and *Manser* v. *London Passenger Transport Board.*[23]]

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[8] [1949] 1 K.B. 222; [1948] 2 All E.R. 987.

[9] [1955] 1 W.L.R. 340; [1955] 1 All E.R. 742.

[10] [1941] Ch. 248.

[11] [1949] 1 K.B. 54.

[12] [1955] 1 W.L.R. 340.

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[13] [1948] P. 341; [1948] 2 All E.R. 489.
[14] [1948] P. 341, 344.
[15] [1948] P. 341.
[16] [1941] Ch. 248.
[17] [1949] 1 K.B. 54.
[18] Ibid. 60.
[19] [1941] Ch. 248.
[20] [1949] 1 K.B. 54.
[21] [1955] 1 W.L.R. 340.

The evidence does not support the plaintiff's submission that Atkins was one of the persons responsible for the safety of the defendants' employees, including the plaintiff. He had nothing whatever to do with the maintenance of the machines and could not be held responsible if the wheels were stiff. On the evidence he could in no way be held responsible for the system of work or the lack of inspection. There is no real possibility that his authority could be impugned by the present proceedings. He was not " a person interested " within the meaning of section 1 (3) and this statement should be admitted.

BARRY J. Some three months after the accident with which the court is at present concerned a representative of the defendants' insurers very properly took a statement from one Atkins, who has most unfortunately since died. Mr. Mars-Jones, again with complete propriety, has sought to tender that statement in evidence under the provisions of the Evidence Act, 1938. It is conceded by Mr. Mars-Jones, as I understand his argument, that at the time when the statement was made, proceedings were at least contemplated; and it is conceded on the other hand by Mr. Chapman, that apart from the provisions of section 1 (3) of the Act, all the other requirements provided for in section 1 have been complied with. Therefore, it rests with me to consider, and to consider only, whether, on the authorities, it can properly be said that at the time when this statement was made Atkins was " a person interested." I think it is clear, as was said by Morton J. in *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.*,[1] that " a person interested " means a person who cannot in a true sense be regarded as an independent person.

A number of authorities have been cited to me. I do not propose to occupy time by considering them in detail. I am satisfied that some qualification must be placed upon the very broad proposition stated by Asquith L.J. in *Barkway* v. *South Wales Transport Co. Ltd.*[2] In that case, speaking of the maker of the statement, the Lord Justice used these words[3]: " His " reputation as a tyre-tester was involved, and apart from that

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[22] (1946) 62 T.L.R. 683; [1946] 2 All E.R. 534.

[23] [1948] W.N. 206.

[1] [1941] Ch. 248, 251; [1941] 1 All E.R. 311.

[2] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.

[3] [1949] 1 K.B. 54, 60.

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Barry J.

"he was interested as an employee in his employers winning the "case." The Lord Justice cited as an authority for the latter part of that proposition *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.*,[4] to which I have already referred. Having regard to that decision, I do not think that Asquith L.J.'s words[5] can properly be read as laying down any general proposition that because the maker of the statement is in the employment of one or other of the parties to an action, that fact in itself must necessarily render any statement which he made inadmissible on the ground that he must necessarily be "a person "interested." With respect, I agree with what was said by Wallington J. in *In the Estate of Hill*.[6] Wallington J. used these words[7]: "It follows that in every case the facts must be "ascertained both as to the person whose statement it is sought "to put in evidence and as to the character and subject-matter "of the 'proceeding' and the relation of the person to the "subject-matter of the proceeding, in order to decide the question "of admissibility."

I have not a great deal of evidence before me as to the exact position of Atkins in the defendant company. I do, however, know this: he was a supervisor on the production side of the defendants' business. He came immediately below the manager of the production shop in the defendants' hierarchy, and was clearly the superior of the plaintiff, who was a chargehand, also on the production side. Further than that, the plaintiff's evidence is (and it is unchallenged) that at the time when he received instructions from the manager of the shop to move the machine which ultimately caused his injuries Atkins was in fact present.

Without going into any details here, it is quite clear that from the outset the plaintiff's claim called into question the efficient administration of the production side of the defendants' business, particularly in relation to No. 1 plant. The manager of the production shop was, of course, primarily responsible for the system of work adopted and for the general run of the production in it. Atkins, as the supervisor immediately below in the hierarchy, was also to a lesser extent responsible. In an action in which (to use the broadest possible term) the method of conducting the production side in No. 1 plant is called into question, I feel bound to hold that Atkins cannot be regarded in a true sense as an independent person. It is not necessary for me to find that his conduct must necessarily be called into question or impugned, but one can imagine circumstances in which it certainly could have been. If, for example, Atkins had known or had had reported to him that this machine which the plaintiff had been told to move was in fact immobile owing to a rusting-up of its wheels and had remained silent when the manager of the production shop gave the order for its removal, without informing the manager of that fact, then, of course, in those circumstances his conduct would in the very real sense be called into question. However, quite apart from any definite criticisms which might have been made against him, it seems to me that any criticism of the conduct of this department would necessarily reflect not only upon the manager of the department but also upon the supervisor. In those circumstances, I think that Atkins was so closely associated with the management of the department which is clearly being called into question by the plaintiff that it would be wrong to treat him as anything other than "a person "interested" within the meaning of section 1 (3) of the Act.

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[4] [1941] Ch. 248.

[5] [1949] 1 K.B. 54, 60.

[6] [1948] P. 341, 344; [1948] 2 All E.R. 489.

[7] [1948] P. 341, 344.

In those circumstances, I do not think it would be right for me to receive this statement in evidence.

Statement excluded.

Solicitors: *Edward Mackie & Co.; Gascoin & Co.*

E. M. W.

PRICE *v.* HUMPHRIES.

1958
July 7.

Lord Goddard C.J., Devlin and Ashworth JJ.

Criminal Law—Evidence—Consent to institution of proceedings—Hearing of charges under National Insurance Act, 1946*—Case for prosecution closed—Objection by defence that since no consent or authorization proved no case to answer—Consent available for production—Whether prosecution entitled to prove consent after case closed—National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 53 (1).

At the hearing of informations charging the defendant with offences under the National Insurance Act, 1946, the defendant pleaded not guilty, and after the case for the prosecution was closed submitted that there was no case to answer on the ground that the prosecution had failed to prove that the proceedings had been instituted by or with the consent of the Minister or other officer as required by section 53 (1) [1] of the Act, and that since the case for the prosecution had been closed, evidence of such consent could not be admitted. The prosecutor stated that the consent was available for production if required, but the justices were of the opinion that no further evidence should be allowed to be adduced by the prosecution and dismissed the informations. On appeal:—

Held, that as proof of the consent was a formal matter arising on the defendant's objection, the justices were wrong in not allowing the prosecutor to produce the consent.

Rex v. *Waller* [1910] 1 K.B. 364; 26 T.L.R. 142 applied.

Rex v. *Day* (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402 distinguished.

Per Devlin J. The point at which the consent or authority required by section 53 (1) must be proved is when the proceedings are "instituted" by the issue of a summons, and since it is the duty of the clerk to the justices or the justice who issues the summons to satisfy himself that section 53 (1) has been complied with, there is a presumption that a summons is good and prima facie proceedings are properly authorized so that there is no need for the prosecution to take any further step unless objection is made. An objection of this sort should be taken by a defendant before the case for the prosecution is closed, and then the burden is passed to the prosecution to show that the proceedings were duly authorized.

CASE STATED by Worcester justices.

On January 13, 1958, two informations were preferred by an officer of the Ministry of Pensions and National Insurance alleging that the defendant, Michael Humphries, contrary to section 52 (1) of the National Insurance Act, 1946, had, for the purpose of obtaining for himself sickness benefit under the Act, knowingly made certain false representations, namely, that because of incapacity he had not worked between certain dates, whereas in fact he had worked between those dates. At the hearing of the informations the defendant pleaded not guilty to the offences. and after evidence had been given as to the facts of the case his solicitor asked whether the case for the prosecution was closed and, upon receiving an affirmative answer, submitted that there was no case to answer. It was contended for the defendant that the prosecution had failed to prove that the proceedings were instituted by or with the consent of the Minister of Pensions and National Insurance or by an inspector or other officer authorized in that behalf as required by section 53 (1) of the Act,[1] and that, the case for the prosecution being closed, evidence of such consent or authority could not be admitted.

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[1] National Insurance Act, 1946, s. 53 (1): "Proceedings for an offence "under this Act shall not be instituted except by or with the consent "of the Minister or by an inspector or "other officer authorized in that "behalf by special or general directions of the Minister."

The prosecutor contended that proof of such authority to prosecute was unnecessary except when required by the court, and stated that it was available for production if required.

The justices were of the opinion that the objection was good in law, since it was clear from the decision in *Rex* v. *Day* [2] that after the close of the case for the prosecution no further evidence should be allowed to be adduced by the prosecution unless it was evidence upon any matter which arose ex improviso or the necessity for which no human ingenuity could have foreseen; and they considered that the authorization of the proceedings was not such a matter. They therefore dismissed the informations.

The prosecutor appealed.

Rodger Winn for the prosecutor. The prosecutor should have been allowed to prove the consent under section 53 (1) of the National Insurance Act, 1946, to the institution of the proceedings. *Rex* v. *Day* [2] is not in point; in *Middleton* v. *Rowlett* [3] a clear distinction was drawn between matters of substance and matters of form, and proof of the consent is a matter of form. In *Reg.* v. *Dexter* [4] it was held that it was not necessary for the prosecution to produce and prove the fiat of the Attorney-General for the presentation of an indictment under the Vexatious Indictments Act, 1859, and in *Rex* v. *Waller*,[5] in the absence of objection by the defence that the consent of the Director of Public Prosecutions had not been given, the consent was presumed. In *Rex* v. *Turner*,[6] in considering what evidence was necessary to satisfy the court that consent had been given, the court was concerned with a later stage of the proceedings.

[LORD GODDARD C.J. But it is not a matter which is within the knowledge of the defendant. If the consent is challenged after the case for the prosecution has been closed, and the prosecution is then given the opportunity to prove the consent, any extra costs incurred may fall upon the defendant. In *Rex* v. *Turner* [6] the court seemed to have no doubt that some evidence must be given.]

It is submitted that the reasoning of the court in *Rex* v. *Waller* [7] shows that there is no need for any evidence of the consent to be given unless it is challenged by the defence. The words "Proceedings . . . shall not be instituted except by or "with . . . consent" in section 53 (1) of the Act refer to the laying of the information. It is at that stage that the consent must be formally produced, and the clerk to the justices should not allow a summons to issue unless he is satisfied that the proceedings are properly authorized. When a summons has been issued, the maxim omnia praesumuntur rite et solemniter esse acta applies.

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[2] (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402.

[3] [1954] 1 W.L.R. 831; [1954] 2 All E.R. 277.

[4] (1899) 19 Cox C.C. 360.

[5] [1910] 1 K.B. 364; 26 T.L.R. 142.

[6] [1910] 1 K.B. 346; 26 T.L.R. 112.

[7] [1910] 1 K.B. 364.

[LORD GODDARD C.J. But sometimes a summons is issued on a direct application to a magistrate.]

The consent is a formality which does not go to the substance of the prosecution's case: it may be challenged as a matter of defence, when the defence may prove that consent was not given, or the burden of proof of consent may shift to the prosecution. For an example of a similar case, see *Hargreaves* v. *Hilliam*[8]; and as to the taking of a purely technical point, see *Rex* v. *Metz.*[9]

[DEVLIN J. Then the consent goes to the question whether the summons is good or bad, so that it is for the defence to take the point that it is bad, when what has to be investigated is whether the laying of the information was properly authorized?]

All that the prosecution seeks is an opportunity to show that the information was laid by an officer authorized by the Minister. Proof that consent existed is no part of the substantive case for the prosecution. If the charges were tried by a jury it would not be for them to consider, on the defendant's objection, whether or not there was consent, but for the judge to rule whether or not the trial was competent.

The defendant did not appear and was not represented.

DEVLIN J. There are many statutes which provide that a prosecution is not to be instituted unless with the authority or consent of some particular officer such as the Director of Public Prosecutions or some other officer who has to consider the matter before the prosecution is brought, and this case stated raises a question of how and to what extent the prosecution is required to prove the existence of such authority and consent as part of its case. It concerns a prosecution brought under the National Insurance Act, 1946.

[His Lordship read section 53 (1) of the Act, referred to the case stated, as set out above, and continued:] The first thing to observe about section 53 (1) is that the authority or consent for which it provides is authority or consent that has to be given for the institution of the proceedings: "Proceedings for an offence "under this Act shall not be instituted except by or with the "consent of the Minister." Proceedings in summary jurisdiction of this sort are instituted by the laying of an information and the issue of a summons, and, when the summons is issued, that is the institution of the proceedings. The point, therefore, at which the consent or authority must be proved is when the summons is issued, and it is the duty of the clerk to the justices if application is made to him, as it generally is, for the laying of the information or the issue of the summons, to see that the requirements of section 53 are complied with, otherwise the summons will be bad. Accordingly, when the matter comes before the court the point that has to be determined, if it is necessary to determine it, is whether the summons be good or bad, whether the proceedings were instituted with or without authority. The usual practice is for the prosecution to produce the formal document to show that the summons was properly issued.

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[8] (1894) 58 J.P. 655.

[9] (1915) 31 T.L.R. 401; 11 Cr. App.R. 164.

The question we have to determine is: what is the position if he fails to do so, as he did in this case? I think that the position has been dealt with, and the law has been fully laid down, in *Rex* v. *Waller*.[1] That was a case, it is true, of an indictment and of the consent of the Director of Public Prosecutions being necessary to that indictment, and the court dealt with it in this way. Lord Alverstone C.J. said [2]: "In *Rex* v. "*Turner* [3] we considered the degree of evidence necessary to "prove the consent in cases in which proof had to be given. "The point which has now been taken is whether prima facie, "and in the absence of objection by the prisoner, any evidence "of that consent need be given at all at the trial. No doubt the "giving of the consent is a condition which must be satisfied in "fact, and unless it has in fact been given the indictment ought "not to be allowed to go before the grand jury. But how far "or under what circumstances that fact need be proved at the "trial is a different matter. Under the Vexatious Indictments "Act an indictment charging offences, in respect of which neither "the prosecutor has been bound over to prosecute nor the person "accused has been committed or bound over to appear and

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[1] [1910] 1 K.B. 364; 26 T.L.R. 142.

[2] [1910] 1 K.B. 364, 366.

[3] [1910] 1 K.B. 346; 26 T.L.R. 112.

"defend, cannot go before the grand jury without the consent of "a judge or one of the law officers. But it is the duty of the "clerk of assize to satisfy himself before the bill is presented "to the grand jury that all the necessary steps preliminary to "indictment have been taken, and, unless objection be taken "by the prisoner that there was no consent in fact, it is to "be presumed that the clerk of assize has discharged his duty "in that respect." I think mutatis mutandis that reasoning applies to this case. It is the duty of the clerk to the justices, or whoever issues the summons, to see that it is not issued unless the consent or the authority is produced, and there is a presumption which indeed is merely a facet of the wider maxim omnia praesumuntur rite et solemniter esse acta that the clerk has discharged his duty in that respect. Accordingly, prima facie the position was that the summons had been properly issued and there was no need for the prosecution to take any further step unless objection was taken. If objection is taken, then they must be in a position to prove it.

I should like to say a word about the position of the justices in regard to whether or not they should allow a case to be re-opened, because it may well be that they found it a rather confusing one. *Rex* v. *Day*[4] lays it down that if the matter is one of substance the prosecution ought not to be allowed to re-open its case. On the other hand, there are authorities which show that if the matter is one of technicality, such as the proof of a statutory rule or order, or something of that sort, then the justices should allow the prosecution case to be re-opened. But where what is in issue is simply the question of whether proceedings are properly authorized, no question really arises about re-opening the prosecution case at all. I think that the application of the principle in *Rex* v. *Waller*[5] to the circumstances of this case is this: that if the prosecution is allowed without objection to close its case, then the prosecution has done all that is necessary and the summons is presumed to be a good one and properly authorized. If the defence wants to challenge that and take objection, they should take their objection before the prosecution case is closed, and having taken their objection the burden will pass to the prosecution to produce the evidence they have which shows that the proceedings were duly authorized.

For these reasons, I think that the decision of the justices was wrong, the appeal should be allowed, and that the case should go back to the justices in order that they may proceed with the hearing of it.

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[4] (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402.

[5] [1910] 1 K.B. 364.

LORD GODDARD C.J. I agree in the result, but I desire to say that the fact that we are differing from the justices is no reflection upon them, because I can well understand that when justices have a case such as *Rex* v. *Day*[6] cited to them, and there is no answer by the prosecution citing some other authority, they may think they are bound by *Day's* case.[6] I think that possibly they might have been in greater difficulties if *Middleton* v. *Rowlett*[7] had been cited to them, for it would still more have led them to believe that they could not allow the further evidence to be given. In a case such as this justices would do well to bear in mind that there is a distinction between an objection which goes to the merits and one which goes only to procedure. If it goes to the merits and the prosecution have failed to prove something upon which the guilt or innocence of the defendant depends, justices must be very careful about allowing cases to be re-opened and must consider the doctrine laid down in *Rex* v. *Day*.[8] But if it is only a matter which goes to procedure, as this does, and as it does in a large number of cases where the consent of the Director of Public Prosecutions or some officer is required to the proceedings, then I do not think that they ought to allow an objection which has been, so to speak, kept up the sleeve until the last minute, so that when the prosecution have been induced to say: "We have closed our case," it is then said: "You have not proved consent." I think that if they bear in mind the difference between an objection which goes to the merits and one which only goes to procedure, many of the difficulties will be cleared up.

ASHWORTH J. I agree with both the judgments which have been given.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Pensions and National Insurance.*

J. F. L.

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[6] 27 Cr.App.R. 168.

[7] [1954] 1 W.L.R. 831; [1954] 2 All E.R. 277.

[8] 27 Cr.App.R. 168.

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Jenkins, Parker and Pearce L.JJ.

PAWSON AND OTHERS *v.* REVELL.

[Plaint No. N. 3696.]

Mortgage—Leasing, power of—Not excluded by mortgage deed—Grant of parol lease by mortgagors—No provision for re-entry on non-payment of rent—Whether lease effective against mortgagees—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 99, 152.

In 1949 N. and his wife, the owners of a farm, mortgaged it to the plaintiffs. The mortgage contained a clause pursuant to section 99 (13) of the Law of Property Act, 1925,[1] excluding the statutory power of leasing, but this clause was ineffective by reason of the provisions of the Agricultural Holdings Act, 1948.

In 1953 the mortgagors orally let the farm to the defendant as tenant from year to year at a rent of £100 payable quarterly, there being no provision for re-entry on non-payment of rent. In proceedings for possession the plaintiffs contended that by reason of the omission of such a condition, which was required by section 99 (7), the lease was not one granted under the statutory power conferred by section 99 (1), and was ineffective as against them as mortgagees. The defendant contended that in so far as the lease was imperfect, it was validated by the provisions of section 152 (1) and (6). The county court judge refused an order for possession. On appeal:—

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[1] Law of Property Act, 1925, s. 99: "(1) A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorized. . . . (7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding 30 days. . . . (13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained. . . . (17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

S. 152: "(1) Where in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease (in this section referred to as an invalid lease) is granted which by reason of any failure to comply with the terms of the power is invalid, then—(*a*) as against the person entitled after the determination of the interest of the grantor to the reversion; or (*b*) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease; the lease, if it was made in good faith, and the lessee has entered thereunder, shall take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power: . . . (6) Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the interest of the grantor or otherwise, cannot have effect and continuance according to the terms thereof independently of the power, the lease shall for the purposes of this section be deemed to have been granted in the intended exercise of the power although the power is not referred to in the lease."

Held, (1) that by virtue of section 152 (6) there should be imputed to the mortgagors an intention to exercise the statutory power of leasing conferred by section 99 (1);

(2) that there was nothing in the authorities to warrant the view that the variation of an oral tenancy agreement by the insertion of a condition of re-entry as required by section 99 (7) would involve a substantial departure from the terms of the agreement; on the contrary, it was exactly the sort of provision the inclusion of which, when necessary to validate the lease, was contemplated by section 152;

(3) that, whether or not it was necessary in an oral tenancy agreement that there should be a condition of re-entry (a question which was open to doubt), on the assumptions that such a condition was necessary, and that its omission would suffice to prevent the agreement being a valid exercise of the mortgagors' powers, the agreement in question was validated by the provisions of section 152.

Observations on the meaning of "inadvertence" in the preamble to the Leases Act, 1849.

APPEAL from a decision of Judge Harper, sitting at Hull County Court.

On April 11, 1949, one Nicholson and his wife, the owners of a farm, mortgaged the farm to the plaintiffs, who were the trustees of a friendly society, to secure the sum of £5,000. The mortgage contained the usual clause excluding the powers of leasing conferred on mortgagors by section 99 of the Law of Property Act, 1925, but that clause was rendered inoperative by the provisions of paragraph 2 of the Seventh Schedule to the Agricultural Holdings Act, 1948.

Some time in 1953 the Nicholsons parted, and the defendant became Nicholson's housekeeper. On June 23, 1953, the Nicholsons orally let the farm to the defendant as tenant from year to year at a rent of £100 payable quarterly, nothing being said about any proviso for re-entry on non-payment of rent. In proceedings taken against the Nicholsons in the Chancery Division an order for possession was made in favour of the plaintiffs on March 2, 1956, which became effective 42 days after the date of service on April 16. The plaintiffs then heard for the first time of the defendant's lease, and instituted in the county court proceedings for possession, which were dismissed. The plaintiffs appealed.

Norman Stogdon for the plaintiffs. The plaintiffs' contention is that this was an informal agreement at common law, because it does not contain a re-entry clause as required by section 99 (7) of the Law of Property Act, 1925, and consequently it was not made under the powers conferred by that section and is not binding on the plaintiffs. The defendant says, first, that an oral letting is not required by section 99 (7) to contain a re-entry clause, and, secondly (as was accepted by the judge below), that section 152 cures any defect which there may be in the lease. As to that, section 152 re-enacts with a slight alteration of language provisions of the Leases Acts, 1849 and 1850, but has not re-enacted the preamble to the Act of 1849, which indicates that the purpose is to validate leases which are ineffective "through mistake or inadvertence." As certain authorities on this question are based on that preamble (which was repealed by the Statute Law Revision Act, 1891), it is questionable how far they are now good law.

The whole object of section 99 is to define the power of leasing conferred on mortgagors. Subsection (7) requires that such a lease shall contain a re-entry clause; as soon as it is established that a requirement specified by the section is absent, the lease is to be considered not as granted under the statutory power but at common law, and is, accordingly, not binding on the mortgagees: see *Iron Trades Employers Insurance Association Ltd.* v. *Union Land and House Investors Ltd.*[2] A statutory provision of this sort must be construed strictly: see *King* v. *Bird.*[3]

The circumstances of the present case show that this was an informal arrangement between a man and his housekeeper which was not disclosed to the mortgagees; it is not to be imputed to the parties that they knew of section 99 or intended to create a lease thereunder; all they were concerned with was a common law lease not binding on the mortgagees. There is nothing in subsection (17) to exclude the necessity of a re-entry clause in an oral letting. It is stated in a note in Wolstenholme and Cherry, 12th ed., vol. 1, p. 400, that subsection (7) does not apply to an oral agreement, but no authority is cited.

The next questions are whether section 152 applies so as to remedy a defective oral tenancy, and, if so, whether such a restored tenancy can be deemed to have been granted under the powers of section 99. The *Iron Trades* case[4] seems contrary to the first contention, while a line of cases under the former Leases Acts indicates that leases cannot be re-made as suggested, the purpose of this legislation and its successor, section 152, being to remedy formal deficiencies and not to re-write the lease in important respects: see *Hallett* v. *Martin.*[5] *Gas Light and Coke Co.* v. *Towse*[6] shows that section 152 would not cure a defect which is not due to mistake or inadvertence, and indicates that ignorance of the law, such as ignorance of the effect of section 99. is not such a defect. A defect of substance cannot be cured by section 152, and this is such a defect: see *In re Newell and Nevill's Contract,*[7] *Brown* v. *Peto*[8] and *Davies* v. *Hall.*[9]

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[2] [1937] Ch. 313; 53 T.L.R. 341; [1937] 1 All E.R. 481.

[3] [1909] 1 K.B. 837.

The parties have in effect created a tenure governed by the Agricultural Holdings Act, 1948. The policy of that Act is that agricultural leases should contain re-entry clauses, as such a clause can be inserted by arbitration. The mortgagees, however, not being landlords, cannot avail themselves of that procedure.

Although the preamble to the Act of 1849 has been repealed by the Statute Law Revision Act, 1891, it was provided that its effect should subsist. In such a case one must still look at the preamble to see what the scope of section 152 is: see Maxwell on the Interpretation of Statutes, 10th ed., p. 44, where it is shown that preambles may be legitimately consulted after repeal: see also *Hawke* v. *Dunn.*[10] In substance the Leases Acts have been re-enacted by section 152 with the language slightly modernized, and the cases decided under them are still good law.

Raymond Walton and *J. B. Mortimer* for the defendant. If a mortgagor with the statutory power of leasing does not quite comply with all the requirements of the power, both he and the tenants should be protected, and it is proper under section 152 to insert such provisions in the lease as are necessary to conform to the power. In the present case the only omission is a provision for re-entry. In an oral lease this requirement is by subsection (17) only applicable " as far as circumstances admit," and taking into account all the circumstances of an oral letting one would not expect to find such a provision. Such a letting might be for

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[4] [1937] Ch. 313.
[5] (1883) 24 Ch.D. 624.
[6] (1887) 35 Ch.D. 519; 3 T.L.R. 483.
[7] [1900] 1 Ch. 90.
[8] [1900] 1 Q.B. 346; 16 T.L.R. 561.
[9] [1954] 1 W.L.R. 855; [1954] 2 All E.R. 330.
[10] [1897] 1 Q.B. 579; 13 T.L.R. 281.

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a term up to three years or some short period which would not usually require such a provision.

But assuming that such a provision is necessary, it is argued that this must be a mere common law tenancy. The parties, no doubt, had never heard of the statutory power of leasing under section 99, but this is just the sort of case that section 152 is intended to cover; a notional intention to exercise the statutory power is all that is required, and that is just the sort of case which falls within the section, supported by the preamble to the Act of 1849, which bases the jurisdiction on "mistake," "inadvertence" or "ignorance." Nothing in the *Iron Trades* case,[11] on which the plaintiffs relied, is authority for the proposition that section 152 cannot apply here; in that case, unlike the present, there was no power to lease without the mortgagee's consent, and section 152 could not be invoked to create a power which never existed.

The cases cited for the plaintiffs merely establish that the remedial powers cannot be applied to alter matters of substance or to change the whole nature of a lease; in *Hallett* v. *Martin* [12] Kay J. emphasized the difference between defects in matters of form and in matters of substance; in *Gas Light and Coke Co.* v. *Towse* [13] there was no mistake, ignorance or inadvertence; in *In re Newell and Nevill's Contract* [14] there was a substantial difference between the type of lease which the lessor had power to grant and the lease actually granted, and in *Brown* v. *Peto* [15] it was sought to set up a lease substantially different from that granted. Nothing in those cases suggests that the omission of a provision for re-entry is beyond the scope of section 152.

The preamble to the Act of 1849 refers to the "omission of "some condition" as one of the defects which are to be rectified; section 99 (7) of the Act of 1925 specifies that there shall be a "condition of re-entry"; it must be that such a condition is within the purview of the Leases Acts. *In re Jackson & Co. Ltd.*[16] shows that ignorance of statutory provisions can constitute "inadvertence." [*Food Controller* v. *Cork* [17] was also referred to.]

Stogdon replied.

JENKINS L.J. stated the facts, read the relevant provisions of section 99 of the Law of Property Act, 1925, and continued:

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[11] [1937] Ch. 313.
[12] 24 Ch.D. 624, 632.
[13] 35 Ch.D. 519.
[14] [1900] 1 Ch. 90.
[15] [1900] 1 Q.B. 346.
[16] [1899] 1 Ch. 348.
[17] [1923] A.C. 647; 39 T.L.R. 699.

Mr. Stogdon, for the plaintiff mortgagees, submits that when all the circumstances of the case are looked at, it becomes apparent that this was not a letting in exercise of the statutory power at all; it was simply a letting at common law to the defendant, binding the interests of the mortgagors, but ineffective so far as the mortgagees were concerned.

One of the matters which has been debated before us is whether, having regard to the terms of subsection (17), it is indispensably necessary that an oral agreement should include a condition of re-entry as stipulated in subsection (7) or whether that is rendered unnecessary by the words "as far as circumstances admit" contained in subsection (17). It is plain that so far, at all events, as a lease in writing is concerned, it must contain the condition stipulated in subsection (7), and there appears to me to be no doubt that the omission from a lease in writing of a condition of re-entry would be a defect sufficient to take the letting in question out of the scope of the power.

The basis of Mr. Stogdon's submission is that, notwithstanding that this was an oral tenancy and as such clearly exempted by subsection (17) from requirements such as those contained in subsections (8) and (11), it ought to have included the condition for re-entry prescribed by subsection (7). On the other side it is said that may or may not be so, but if it is so, then any consequent invalidity of the tenancy agreement is cured by the provisions of section 152 of the Law of Property Act, 1925.

That section is the successor of the Leases Acts of 1849 and 1850, and I should next read some parts of it. [His Lordship read subsections (1) and (6) and continued:]

A first reading of the provisions of sections 99 and 152, to which I have referred, without regard to any authority but simply reading the language of the two sections as they stand, would seem to indicate that if the oral tenancy agreement in this case was invalid as a lease granted in exercise of the mortgagors' power of leasing, it was validated by the provisions of section 152 (1) and (6), and the effect of subsection (1) of that section would be to make the oral tenancy agreement "take effect in equity "as a contract for the grant, at the request of the lessee, of a "valid lease under the power, of like effect as the invalid lease, "subject to such variations as may be necessary in order to "comply with the terms of the power," the one and only variation necessary for that purpose, as I understand the position, being the inclusion of a condition of re-entry on non-payment of rent as required by subsection (7) of section 99.

I have said enough to show that to my mind the obstacles confronting Mr. Stogdon in seeking to make good his contention are formidable indeed, but he has nevertheless presented his case in a very clear and forceful manner, and we are indebted to him for his assistance. He starts by saying that in all the circumstances of this case no intention to exercise the statutory power can properly be inferred. He says this was an informal, and he might have said, I think, a "hole and corner," arrangement between Nicholson and his housekeeper. Its very informality and the fact that it was not made known to the mortgagees until this present action was actually in progress are, says Mr. Stogden, indications that this was a mere informal arrangement made without regard to the statutory provisions to which a lease granted by the mortgagors must conform in order to make it binding on the mortgagees. He says, therefore, that this must be regarded simply as a letting at common law.

Then as to the validating provisions of section 152, Mr. Stogdon referred us to the preamble in the Leases Act of 1849. That preamble is in these terms—I need not read the whole of it. It begins: "Whereas, through mistake or inadvertence on the "part of persons granting leases, and through ignorance on the "part of lessees of the titles of persons from whom leases are "accepted, leases granted by persons having valid powers of "leasing are frequently invalid as against the successors in estate "of such persons by reason of the non-observance or omission "of some condition or restriction, or by reason of some other "deviation from the terms of such powers . . ." I think it is unnecessary for me to read further.

Mr. Stogdon fastened upon the words "mistake or inadvertence" and said there was nothing amounting in this case to inadvertence or mistake. Here the parties intended simply that the defendant should have an informal oral tenancy. They were ignorant of, and there was no intention to exercise, the mortgagors' leasing power. In my view that submission is really demolished by the plain terms of section 152 (6), the effect of which is that where a person grants a lease which he can only grant as a valid lease in exercise of the power, he is to be deemed to have granted it in intended exercise of the power. The clear words of that subsection, as I think, require us to impute, for the purposes of validation, an intention on the part of the mortgagors in this case to exercise the power. As to the use of the phrase "mistake or inadvertence" in the preamble to the Act of 1849, Mr. Walton said that the point sought to be made on these words by Mr. Stogdon was more than offset by the reference to ignorance on the part of lessees of the title of persons from whom leases are accepted, and I should also note that with respect to the types of error which might give rise to a case for validation, Mr. Walton called attention to the words " by reason of the non-" observance or omission of some condition or restriction."

Then Mr. Stogdon said in effect that where a lease was made in terms exceeding the statutory power it ought, prima facie at all events, to be regarded as a mere grant of a tenancy at common law, and in support of that submission he referred us to *Iron Trades Employers Insurance Association Ltd.* v. *Union Land and House Investors Ltd.*,[1] in which the leasing powers of mortgagors were discussed at some length by Farwell J. Mr. Stogdon's proposition on this part of the argument was in effect this, that so soon as it is found that there is any omission from a lease by a mortgagor of anything required to be included by section 99 of the Act of 1925, or that the mortgagor has failed to do something required to be done under that section, then the lease should not be regarded as made in purported exercise of the power for the purpose of validation under section 152. It seems to me that if one accepted that proposition, at all events in the broad form in which it was put by Mr. Stogdon, section 152 would be deprived of practically the whole of its effect. In my view nothing said by Farwell J. in the *Iron Trades* case [2] bears out that broad proposition.

In that case the facts stated in the headnote are these: " By a legal charge dated October 1, 1935, the defendants charged " by way of legal mortgage certain freehold properties to the " plaintiffs, and they covenanted with the plaintiffs that they " would not, except with the previous written consent of the " plaintiffs, exercise the power of leasing or agreeing to lease or " of accepting surrenders of leases conferred by the Law of " Property Act, 1925, on a mortgagor while in possession." Then there was a letting in connexion with which the plaintiffs were not asked for and did not give their consent, and the decision was " that the defendants, in granting the lease of " October 8, were not exercising their statutory power, and that " consequently they did not commit any breach of the covenant " contained in the legal charge of October 1."

Mr. Stogdon said that the effect of that case is that the mortgagors, having failed to comply with the terms of their

[1] [1937] Ch. 313; 53 T.L.R. 341; [1937] 1 All E.R. 481.

[2] Ibid.

power, were treated accordingly as exercising merely their common law power of letting which would not bind the mortgagees. But I think the true effect of the judgment in that case was as stated by Mr. Walton in the course of his argument. He said that there were two points in the judgment: the first was that the mortgagors had no power at all to lease without the consent of the mortgagees, and the second was that having no such power they could not, by recourse to section 152, create a power which did not exist. There being no power to lease without consent, and that non-existent power being the power they purported to exercise, it is plain that the case was not one to which section 152 could apply. Accordingly, in my view, that case does not advance Mr. Stogdon's argument.

Then Mr. Stogdon referred us to a number of authorities showing that section 152 and its statutory precursors did not go the length of creating a substantially different lease from the lease purported to have been granted in exercise of the power. I do not propose to refer to these cases at any length. I might mention first the case of *Hallett* v. *Martin*,[3] and that was cited for this statement by Kay J.: "I must say I think this "lease, in any view of the case, is bad and invalid, as departing, "not in a mere formal manner, from the terms of the power but "departing from them in essential respects."

Then in the case of *Gas Light and Coke Co.* v. *Towse*,[4] which was another decision of Kay J., who in the material passage referred to the preamble to the Leases Act of 1849, and continued: "Now, has there been here any 'mistake' or "'inadvertence' or 'ignorance on the part of the lessees' of the "title? Nothing of the kind." Then further on he said[5]: "There is no 'mistake,' no 'inadvertence,' no 'ignorance of "'title,' nothing whatever which would enable me to apply the "terms of that Act to this lease. I cannot find any defect; I find "that the parties deliberately, voluntarily, knowing exactly what "the powers were, chose to take their lease in this form. I am "quite unable to see any defect, any mistake, any inadvertence, "or anything whatever to induce me to alter the form of the "lease in any respect. So much for that objection."

As to the other cases cited by Mr. Stogdon, I may confine myself, I think, to making brief references to the following. *In re Newell and Nevill's Contract*[6] concerned a lease granted by a tenant for life of the surface, reserving the minerals, where there was no power for him to grant such a lease. It is obvious the difference there between the lease purported to have been granted and the lease which the tenant for life had power to grant was clearly a most substantial matter.

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[3] (1883) 24 Ch.D. 624, 632.

[4] (1887) 35 Ch.D. 519, 539; 3 T.L.R. 483.

[5] 35 Ch.D. 519, 540.

[6] [1900] 1 Ch. 90.

Then there was *Brown* v. *Peto*,[7] where a lease included furniture and sporting rights as well as land, and the whole was let at one rent without distinguishing what portion of it was attributable to such things as the furniture. That again was obviously a very different case from the present, because the lease when validated would be substantially different from the lease purported to have been granted. I find nothing in those authorities, or any other authority cited to us, to warrant the view that the variation of the oral tenancy agreement which is here in contemplation, namely, the insertion of the condition of re-entry required by section 99 (7) of the Act of 1925, involved a substantial departure from the terms of the agreement. It is wholly different from cases such as those concerning the omission of covenants to erect buildings or some matter of that sort. The condition here in question may be described as a common form condition which is ancillary to the other provisions of the lease, and is commonly regarded as necessary to make a lease of given property a proper lease of that property. There is no doubt that section 152 contemplates the variation of the provisions of a lease where that is necessary in order to bring it within the terms of the section, and it appears to me that a provision such as this condition of re-entry is exactly the sort of provision the inclusion of which, when necessary in order to validate the lease, was contemplated by section 152.

I now return to what are really the two points in the case: First, where there is an oral tenancy agreement by a mortgagor, is it necessary for its validity under section 99 (17) that it should include the condition of re-entry stipulated in section 99 (7)? This is a short but, to my mind, not an easy point. In Wolstenholme and Cherry, 12th ed., vol. 1, p. 400, there is this note to subsection (17): "Parol agreement. The effect of the "words 'as far as circumstances admit' is that subsections (7) "and (8) as to covenants, conditions of re-entry and counter-"parts do not apply to a parol agreement, and subsection (7) as "to covenants does not apply to an agreement in writing, except "that there ought to be the nearest approach to a covenant,

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[7] [1900] 1 Q.B. 346; 16 T.L.R. 561.

"namely, an agreement to pay rent." Thus the learned authors of this particular textbook state categorically the view that a condition of re-entry is not required in such a case. But I am not wholly satisfied of that. The only condition of re-entry required is a condition of re-entry on the rent not being paid within a time therein specified not exceeding 30 days. I suppose section 99 (7) could be satisfied by a short condition simply in the terms there laid down. A simple provision of that sort would be as easy to include in an oral tenancy agreement as a provision for the payment of rent on the four usual quarter days. The matter seems to me to be open to doubt, and I prefer to express no opinion upon it. Assuming, without deciding, that a condition of re-entry is required in the case of an oral agreement notwithstanding subsection (17), and assuming further, as I think is right, that that omission, if the condition was necessary to be included, would suffice to prevent the agreement being a valid exercise of the mortgagors' power, nevertheless it appears to me that a clear case is here made out for validation of the agreement by recourse to section 152.

I should perhaps add one word about "inadvertence." It appears to me that the proper inference from the facts is that the mortgagors intended to give the defendant a tenancy which would be valid as against all the world so far as they were able to do that. They may well have been unaware of the existence of any special power of leasing. They may have simply assumed that any mortgagor could grant a tenancy. I think their ignorance of their true rights in the matter and their consequent failure to include the condition of re-entry, which I am assuming but not deciding should have been included in the oral agreement, amounted to inadvertence within the meaning of the preamble to the Act of 1849, so that so far as it is legitimate to look at the preamble to the Act of 1849 for the purpose of construing section 152, I do not think there is anything in that expression to prevent the application of section 152. If the facts of this case did not amount to inadvertence, I find it very difficult to see how a case of inadvertence could ever be made out. A man granting an interest in land and failing to grant the interest he intended to grant through non-compliance with a power, the existence of which he may have been ignorant of or may have forgotten or overlooked, is acting I think through inadvertence in any ordinary meaning of that expression.

I hope I have now covered all the essential points in this somewhat unusual case, and for the reasons I have endeavoured to state, I think this appeal fails and should be dismissed.

PARKER L.J. I agree that this appeal fails and for the reasons given by my Lord. I would only add this, that in my view the real clue to the decision in this case is to be found in subsection (6) of section 152. Once the conditions set out in that subsection are found to exist, and they clearly do exist in the present case, then the lease shall for the purposes of that section be deemed to have been granted in the intended exercise of the power. Accordingly, once that stage is reached, the power to vary the invalid lease by curing defects in it arises under subsection (1) of section 152. For the reasons given by my Lord, once that stage is reached, I think that whether one looks at the preamble to the Leases Act of 1849 or not, it is plain that there is power under section 152 to vary the lease by supplying a condition for re-entry as required by section 99.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *F. Wilberforce Bridge for Richard Witty & Co., Hull; Smith & Hudson for Payne & Payne, Hull.*

F. R. D.

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[Plaint No. N. 159.]

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July 24, 25.

Jenkins, Parker and Pearce L.JJ.

Arbitration—County court—Powers of judge—Application to set aside arbitrator's award—Scope of judge's discretion—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 89 (1) (3) (*as amended by Administration of Justice Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 31 (4)).

The plaintiff let to the defendant a furnished house, on the terms that the defendant should keep the demised effects and premises in the same order as they then were and should so surrender them on the expiration of the term, a reasonable use and wear and tear excepted. A dispute arose regarding dilapidations which was referred to arbitration pursuant to section 89 of the

County Courts Act, 1934.[1] The plaintiff claimed £314; the arbitrator awarded £92, as he considered that much of the dilapidations constituted fair wear and tear and that in any event the premises required a thorough redecoration which ought not to be charged to the defendant.

The plaintiff applied to the county court judge to set aside the award, on the ground that there were errors of law on its face. The judge held that there were no such errors of law, but that the plaintiff had suffered a serious injustice in that it appeared that the arbitrator had acted in some degree on theory and not on evidence. He held that the power conferred by section 89 (3) on a county court judge to set aside an award "if he thinks fit" gave a wide discretion which ought to be exercised under the circumstances, and he set aside the award. On appeal:—

Held, allowing the appeal, that in the exercise of his powers under section 89 (3), a county court judge had no wider discretion than the High Court when setting aside an award and must act upon the same principles.

Brown v. *Dean* [1910] A.C. 373 applied.

Per Parker L.J. There appears to be no express power under section 89 (3) to remit an award; that is an unfortunate omission, as such a power is really essential for the proper working of the section.

Appeal from Judge Leon, sitting at Willesden County Court.

Under an agreement in writing dated August 4, 1954, the plaintiff let to the defendant certain furnished premises for six months as from July 6, 1954. By reason of a further agreement and by holding over the defendant remained in occupation of those premises until May 4, 1956. Throughout that period it was a term of the tenancy that the defendant should "take "due and proper care of the demised furniture and effects and "to keep the same and the said premises and garden and the "fixtures and conveniences thereto in the same state and con- "dition as they now are and so surrender the same at the "expiration or sooner determination of the tenancy reasonable "use and wear and tear and damage by accidental fire ex- "cepted"; and also should "pay for the cleaning or washing "of such blankets counterpanes curtains covers and other

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[1] County Courts Act, 1934, s. 89 (as amended by the Administration of Justice Act, 1956, s. 31 (4)): "(1) The "judge may, with the consent of the "parties to any proceedings, order the "proceedings to be referred to arbitra- "tion . . . to such person or persons "and in such manner . . . as he thinks "just and reasonable. . . . (3) On any "such reference the award of the arbi- "trator . . . shall be entered as the "judgment in the proceedings and "shall be as binding and effectual to "all intents as if given by the judge: "Provided that the judge may, if he "thinks fit . . . set aside the award, "or may, with the consent of the par- "ties, revoke the reference or order "another reference to be made in the "manner aforesaid."

"articles as may require washing or cleaning at the expiration "or sooner determination of the tenancy to leave clean the "chimneys and windows and to make good all such articles "as may become broken lost chipped stained cracked or otherwise injured during the tenancy or at the option of the landlord "to pay for the same."

After the tenant had left the premises disputes arose as to the amount of the dilapidations, and in due course the plaintiff commenced these proceedings in the county court claiming damages. The damages claimed were £314 8s. 6d., and broadly speaking could be classified under three heads: (1) the cost of making good the decorations, (2) cleaning, etc., of the soft furnishings, and (3) damage to furniture.

The matter was referred under section 89 to arbitration, and one Jones, an experienced surveyor, was appointed arbitrator. The hearing took four days: first, April 29 and 30, then on May 1 the arbitrator inspected the premises, on May 3 he continued the hearing, and finally on September 18 he had a special hearing to hear argument in regard to costs. By his award of September 20, 1957, the arbitrator awarded the plaintiff damages in the sum of £92 9s. as against the sum claimed. That sum of £92 9s. was mainly in regard to the second and third heads of claim. With regard to the first head in respect of the decorations, he took the view that by May 4, 1956, when the defendant left the premises, they needed general redecoration as the result of fair wear and tear, and that such damage as the defendant had done over and above fair wear and tear would be made good without extra cost in the general redecoration. Accordingly, the arbitrator came to the conclusion that the plaintiff had not proved any damage under that head. He did, however, allow something in respect of cigarette burns which he felt would not be made good in the general redecoration, and he also allowed something in respect of a back lobby, which had been completely redecorated just before the defendant went into occupation. He went on to say that if the conclusion that he had come to, namely, that the plaintiff had not shown that he had suffered any damage under that head, was wrong in law, he would have awarded the sum of £65. Finally, in regard to costs he only awarded the plaintiff a third of his costs, taking the view that the claim was exaggerated and that in regard to the first head, the damage to the decorations, the plaintiff's claim had failed.

On September 30, 1957, the plaintiff landlord gave notice of an application to the county court under the proviso to subsection (3) of section 89 to set aside the award of the arbitrator. It was based on two grounds; first, that there was an error of law on the face of the award in the arbitrator's holding that no damage had been shown, and, secondly, that there was an error of law disclosed in that the arbitrator had deprived the plaintiff of two-thirds of his costs. The matter came before the county court judge on March 6, 1958, when he held that there was no error on the face of the award either in respect of the arbitrator's decision in regard to the decorations or in regard to his decision in respect of costs. He, however, came to the conclusion that his discretion to set aside an award under subsection (3) of section 89 was wider than the High Court had under the Arbitration Act of 1950 or under its inherent jurisdiction. The judge held that he could set aside an award if he felt that there might be a serious injustice.

In his award the arbitrator had said this in regard to the head: Decorations: "I find that the house was redecorated "in 1950 and that these decorations could not be expected "to last more than seven years in property of this type, although "I consider that five years would be a more reasonable estimate "of their life. It therefore follows that the house was due "for redecoration by the time the defendant yielded up posses-"sion, and such markings as the defendant may have made "would not worsen the plaintiff's position. All decorations were "covered by a 'fair wear and tear clause' in the lease, and "the reparation of such fair wear and tear would correct any "damage which may have been done by the defendant without "extra cost to the plaintiff. I therefore find that the plaintiff "has failed to prove that any damage has been suffered."

As to that finding the county court judge said: "If the "arbitrator had only said that he had inspected the house (as "he had on May 1, 1957) and that he was satisfied from its "condition on his inspection and from the evidence called before "him that it required redecoration on the surrender by the "defendant by reason of fair wear and tear, apart altogether "from the additional damage, his award on this point could "not be criticized. But he has not simply said that. It was "common ground that nothing had been done to the premises "since the delivery up of possession in order that the arbitrator "might see its actual condition. It should, therefore, have "been perfectly simple for an arbitrator, who is a surveyor,

" to base his findings substantially on what he saw. But the " first two sentences of the paragraph headed: 'Decorations' " strongly suggest at any rate that the arbitrator was basing " his finding that redecoration was necessary in any event by " theorizing. He finds that the house was redecorated in 1950 " and then proceeds apparently to arrive at his conclusion by " what normally would happen with a house of that type. " Houses and decoration vary and so does the weather. Any " one house may require redecorating sooner than another for " a variety of reasons. Where the house is not available for " inspection it is only possible to come to a decision upon the " probabilities. But where a house is available for inspection " theorizing appears to me to be quite irrelevant. The arbitrator was in a position to say from his inspection whether the " house needed redecoration." Then later he said this: " Now " an award by a non-legal arbitrator is not to be read too " closely for niceties of language, but, even bearing that in " mind, I feel bound to say that the way in which the arbitrator " appears from the form of his award to have arrived at his " decision is unsatisfactory and may do a serious injustice to " the plaintiff. In these circumstances I am satisfied that if " I have a general power to set aside the award it ought to " be set aside, but I am not satisfied that the plaintiff has " established that there is an error of law appearing on the " face of the award. The onus is upon him to satisfy me as " to this and he has not done so. It is one thing to find an " award couched in unsatisfactory language which shows that " an injustice has been or may have been done. It is another " thing to be satisfied that the award contains a patent error " of law." Having so held, he went on to hold that in fact he had a general discretion under the section. He summarized the matter thus: " But where, as in this case, a judge considers " that a serious injustice may have been done to one of the " parties, he will certainly be entitled to exercise his discretion " to set aside an award."

The tenant appealed.

John Davies for the tenant. A county court judge when exercising his discretion under section 89 (3) must exercise it according to the principles generally established in the High Court, and not on such a ground as the existence of an " injustice." This section follows the lines of section 77 of the original Act of 1846. It was never the intention of the legislature then or in

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the later Acts to create a discretion wider than that exercisable under the ordinary principles of common law; the words "if he "thinks fit," on which the judge relied, do not in effect add to the power given by the words "the judge may." If the discretion is to be exercised in this way, there will be little or no finality to the findings of arbitrators.

Morgan v. *Mather*[2] lays down that awards are not to be set aside because the court differs from the arbitrator's view of the facts; the court must make every reasonable intendment to support the award. In the present case the judge should have adopted as a reasonable view the fact that as the arbitrator had inspected the premises his award was based on what he had seen. *Kiril Mischeff Ltd.* v. *Constant Smith & Co.*[3] was a case under section 10 of the Arbitration Act, 1889, which provides that a "judge may from time to time remit the matters referred . . . ," and it was held, following *Hodgkinson* v. *Fernie*,[4] that it was not intended to alter the general principles on which the courts had acted; it was also stated that where parties have chosen their own arbitrators, and incurred expense at the hearing, a discretion to set the award aside and so render the expenditure nugatory should be sparingly exercised.

It would seem that the power to remit is purely statutory in the Arbitration Acts and does not exist at common law. [*Simpson* v. *Inland Revenue Commissioners*[5] and Russell on Arbitration, 15th ed., p. 266, were referred to.] Even if there were an inherent or statutory power to remit, there would be no ground for exercising it in this case; it would only be to ask a question which would receive an obvious answer: did you base your findings on your inspection?

The judge was right in holding that there was no error of law on the face of the award. The fact that he thought that the arbitrator had approached the matter wrongly does not establish an error of law. The damage in a case like this is the diminution in the value of the premises, which may in some cases be the cost of restitution. It was perfectly reasonable to consider the case in this way: the house has for some time needed redecoration in any event, and the tenant had a fair wear and tear clause; from an inspection it is seen that there is some damage which is not within that clause; the remedy for that damage is restitution, and restitution is redecoration which would have to be done in

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[2] (1792) 2 Ves.Jun. 15.

[3] [1950] 2 K.B. 616; 66 T.L.R. (Pt. 1) 742; [1950] 1 All E.R. 890.

[4] (1857) 3 C.B.N.S. 189.

[5] [1914] 2 K.B. 842; 30 T.L.R. 436.

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any event; to award damages would be to pay the landlord for doing what he would have to do in any event, and that would be hard on the tenant. [*Hanson* v. *Newman*[6] was referred to.]

If the discretion is unfettered, as the judge has held, it still can only be exercised on good grounds and for proper reasons. Here it was based on an unwarranted assumption, contrary to all the probabilities of the case, that the arbitrator proceeded on mere theory and did not take into account the state of the premises as he saw them; even a wide discretion should not be exercised in such a way.

A. R. Barrowclough for the landlord. The award of the arbitrator in this case was quite unjustifiable and may be compared to a decision of a judge in a fatal accident case that no damages should be awarded as the deceased was so old that according to the life tables he should have been dead already. It is wrong to say that there is no damage when injuries not covered by a fair wear and tear clause are caused to old decorations. The only circumstance in which no damages could be awarded would be where the decorations were so appallingly dilapidated that no further injury could make them worse. Each room should be examined and judged on its own merits, and it is only where there is a finding that in every case the condition was such that the unjustified injuries done by the tenant's family would make no difference that a finding that there was no legal damage could be justified. It seems established that the arbitrator reached his conclusions on mere a priori grounds, which was wrong in law, and the award could be set aside accordingly, in accordance with the ordinary principles governing the exercise of discretion. If, moreover, the judge has a wider discretion, as he held, it could not be said to be wrongly exercised in quashing an award which had been arrived at on a wholly wrong basis.

On the question of discretion, the power to set aside is exercisable by the judge "if he thinks fit." Those are wide words and seem to have been inserted on purpose in order to confer a wide discretion.

[PARKER L.J. The power of a county court judge to order a new trial was considered by the House of Lords in *Brown* v. *Dean*.[7] The power was exercisable by the judge under the County Courts Act, 1888, "if he shall think just." The judge had exercised his discretion to order a new trial on principles wider than those applicable to the exercise of discretion in the

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[6] [1934] Ch. 298; 50 T.L.R. 191.

[7] [1910] A.C. 373.

High Court, and the House held that the High Court principles should be applied.]

That case is certainly authority for the view that discretion in some cases is limited to High Court principles. But the discretionary power of the High Court to remit or set aside is governed by the word "may" which appears in the Common Law Procedure Act, 1854, and the Arbitration Acts, and it may be that the words "if he thinks fit" were inserted to confer a wider discretion than that available under the Arbitration Acts.

The reasoning of the arbitrator which led to his award indicated that he erred in law in his approach to the question of damages. If the reasons given for an award are wrong, then it can be set aside. In *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*[8] it was said that the power to quash a speaking order of an inferior tribunal was the same as the power to set aside the award of an arbitrator which was erroneous in law on its face.

The award to the plaintiff of only one-third of his costs, on the ground that his claim was exaggerated, was erroneous and amounts to an error of law; the plaintiff recovered on a large number of items and the arbitrator adopted a wrong approach to the matter. [*W. Hughes & Son* v. *Satchell*,[9] *Harris* v. *Petherick*[10] and *Owen* v. *Nicholl*[11] were referred to.]

JENKINS L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. This is an appeal from a judgment of His Honour Judge Leon sitting at Willesden County Court on March 6, 1958, setting aside the award of an arbitrator in a reference by consent under section 89 of the County Courts Act of 1934. It is convenient to refer at the outset to the terms of that section. It is in these terms (as amended): "(1) The judge may, with the consent "of the parties to any proceedings, order the proceedings to be "referred to arbitration (whether with or without other matters "within the jurisdiction of the court in dispute between the "parties) to such person or persons and in such manner and on "such terms as he thinks just and reasonable. (2) No such

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[8] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268 (Divl.Ct.); [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122 (C.A.).

[9] (1925) 134 L.T. 93.

[10] (1879) 4 Q.B.D. 611.

[11] [1948] W.N. 138; [1948] 1 All E.R. 707.

" reference shall be revocable by any party except with the consent of the judge. (3)"—which is the important subsection here—" On any such reference the award of the arbitrator, " arbitrators or umpire shall be entered as the judgment in the " proceedings and shall be as binding and effectual to all intents " as if given by the judge: Provided that the judge may, if he " thinks fit, on application made to him within such time as may " be prescribed by County Court Rules, set aside the award, or " may, with the consent of the parties, revoke the reference or " order another reference to be made in the manner aforesaid."

This case raises interesting questions as to the exact powers given to a county court judge under subsection (3), which is substantially in the same terms as section 77 of the County Courts Act of 1846. [His Lordship stated the facts, and continued:]

Against that judgment the defendant tenant appeals to the court, and Mr. Davies on his behalf makes two submissions: first, that the judge was wrong in holding that he had a general discretion to set aside. He could, says Mr. Davies, only set aside the award on the same grounds as would entitle the High Court to set aside an award, namely, for an error of law or for misconduct or for an improper procuring of an award. Secondly, and in the alternative, he says that even if the judge had a wider discretion, it was wrongly exercised in the present case in that it was based on a fallacious assumption, namely, that the arbitrator might have based his finding entirely on theory and might have ignored the actual condition of the premises which he undoubtedly saw on his inspection on May 1.

The plaintiff landlord, on the other hand, puts in a counter-notice and Mr. Barrowclough on his behalf makes two submissions: (1) that the arbitrator's award in regard to these decorations discloses an error of law on its face, and (2) that the finding in regard to costs also shows an error of law.

It is convenient, I think, to deal first with the plaintiff's contention because if there is an error of law manifest on the face of this award, then I do not think that anybody could be heard to suggest that there was not ample power to set the award aside. For my part, like the judge, I am not satisfied that there is any error of law manifest on the face of the award in the sense that that expression has been used. It certainly cannot be asserted that the whole or a proportion of the cost of making good damage is necessarily the test. The measure must vary from case to case according to the exact facts. But Mr. Barrowclough, while I think agreeing with that, says that

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here it is shown that the arbitrator made the wrong approach; that he was finding, as he did, on a theory that decorations only last so many years and that, accordingly, when that number of years is up, the premises require redecoration; only, says Mr. Barrowclough, if he had said that having examined the premises he had come to the conclusion that the whole of the premises required complete redecoration and that such damage as the tenant had done had not made any additional damage to the premises, would the finding be justified.

I am not prepared to adopt the view that he did ignore what he found at his view. After all, either what he saw confirmed the theory or it did not, and if it did not confirm the theory, then this arbitrator was guilty of grave misconduct, for which, as I see it, there is no real warrant. Indeed, the approach that the court makes to an award has always been to support the validity of the award and to make every reasonable intendment and presumption in its favour, and I cannot think that this experienced surveyor did intend to base his finding entirely on theory; indeed, he must have been influenced by what he saw in his apparently very careful inspection of the premises. As regards the question of costs, I, again like the judge, am quite satisfied that whatever view one might have taken oneself in regard to the award of costs, it certainly cannot be said that in doing what he did the arbitrator erred in law.

Accordingly, I pass to the first, and the more interesting, I think, of the points involved, namely, whether the county court judge under the section has a wider discretion than has the High Court in regard to the setting aside of an award such as this. As I have already said, this power to set aside first appeared in the Act of 1846 and in substantially the same form. At that time the position of the higher courts in regard to awards was, I think, this. The only statutory power to set aside was to be found in the Arbitration Act of 1698 in these terms: "And be it further "enacted by the authority aforesaid that any arbitration or "umpirage procured by corruption or undue means shall be "judged and esteemed void and of none effect, and accordingly "be set aside by any court of law or equity." At the same time the court had always exercised its inherent jurisdiction at common law to set aside an award for misconduct. That inherent power was made statutory in the Arbitration Act of 1889, and in 1802, as the county court judge points out, in *Kent* v. *Elstob*,[1] the court asserted power to set aside awards for errors of law. Moreover, at the time of the County Courts Act, 1846, there was no power to order a special case on a point of law. That, I think, was first given by the Act of 1889, and also there was, as I understand it, no general power to remit; indeed, that power to remit was first given by the Common Law Procedure Act of 1854. In *Hodgkinson* v. *Fernie*[2] Cockburn C.J. said this: "The only "remaining question is whether or not the court is called upon to "interfere by reason of the 8th section of the Common Law Pro-"cedure Act, 1854, 17 & 18 Vict. c. 125. It is true that section "gives the court authority, in any case where reference shall be "made to arbitration, at any time, and from time to time, 'to "'remit the matters referred, or any or either of them, to the "'re-consideration and re-determination of the said arbitrator, "'upon such terms, as to costs and otherwise, as to the said "'court or judge may seem proper.' I am, however, clearly of "opinion that it was not intended by that enactment to alter the "general law as to the principles upon which the courts had been "in the habit of acting in determining whether they would or "would not set aside awards; but merely to give the court power "to remit the matter to the arbitrator for re-consideration in all "cases, though the submission should not contain that extremely "useful clause giving them that power, where it turned out that "there was a fatal defect in the award, but of such a nature as "not to render it expedient to set aside the award, and thus "render nugatory all the expense that had been incurred under "the reference."

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[1] (1802) 3 East 18.

The judge felt that the failure of Parliament in the Act of 1846 to lay down the limits of the powers disclosed an intention to leave it completely at large, and the words "if he thinks fit" supported, he thought, that view. Thus he said: "It would "have been perfectly simple for Parliament in 1846 to provide "in section 77 the grounds upon which an award could be set "aside, as was provided in the Act of 1698 or as was later enacted "in the various Arbitration Acts. But it did not do so. It left "on the face of it an unfettered judicial discretion to the judge "to set aside 'if he thinks fit.'"

With all respect to the county court judge, I am unable to take the same view. The failure of Parliament to do in regard to the jurisdiction of the county court what it had failed to do in regard to the jurisdiction of the High Court is, in my judgment,

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[2] (1857) 3 C.B.N.S. 189, 201.

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no ground for saying that it intended to confer on the county court a different and wider jurisdiction. It must be remembered that the courts were in those days far less inclined to interfere with awards than today. In those days misconduct, to justify setting aside an award, had to be what I may call real as opposed to technical misconduct, and, indeed, a manifest error of law had only then recently been held to be a ground for setting aside an award, a matter which, incidentally, many judges regretted. Indeed, in *Hodgkinson* v. *Fernie*, to which I have referred, Williams J. said this[3]: "The law has for many years been "settled, and remains so at this day, that where a cause or "matters in difference are referred to an arbitrator, whether a "lawyer or a layman, he is constituted the sole and final judge "of all questions both of law and of fact. Many cases have fully "established that position, where awards have been attempted to "be set aside on the ground of the admission of an incompetent "witness or the rejection of a competent one. The court has "invariably met those applications by saying: 'You have con-"'stituted your own tribunal; you are bound by its decision.' "The only exceptions to that rule are cases where the award is "the result of corruption or fraud, and one other, which, though "it is to be regretted, is now, I think, firmly established, viz., "where the question of law necessarily arises on the face of "the award, or upon some paper accompanying and forming "part of the award. Though the propriety of this latter may "very well be doubted, I think it may be considered as "established."

In those circumstances I feel that if Parliament had intended the county court to exercise a jurisdiction on wider principles than those exercised in the High Court, express words would have been necessary to confer that extended jurisdiction, and I cannot think that the words "if he thinks fit" are sufficient to attain that end. Indeed, I think that some help is to be gained from a consideration of the case of *Brown* v. *Dean*.[4] In the County Courts Act of 1888, and in the County Courts Act of 1846, there was a provision that a county court judge could order a new trial, and the words in the Act of 1888 were "if he shall "think just." The words in 1846 were "if he shall think fit." In *Brown* v. *Dean* the county court judge had granted a new trial on the basis of new evidence which it was said had come to light since the trial. The Divisional Court reversed his decision, the

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[3] 3 C.B.N.S. 189, 202.

[4] [1910] A.C. 373.

Court of Appeal upheld the Divisional Court, and the matter came before the House of Lords. The argument proceeded thus[5]: "The County Courts Act, 1888, gives a full and absolute "discretion to order a new trial 'in every case,' but of course "the discretion must be judicial. The judge must think it just "that there should be a new trial. That is the only condition. "There is no warrant for adding the words that the rules of the "High Court apply to county courts." Lord Loreburn, after stating the principles upon which the High Court would act in such a case, referred first to the judgment in the Court of Appeal by Farwell L.J. He said[6]: "I agree with the judgment of "Farwell L.J., in which he says, referring to the earlier autho"rities, 'In the present case the county court judge has dis"'regarded those principles, and has granted a new trial on "'affidavits which shew at the outside that there will be oath "'against oath on a new trial—and that is clearly not enough— "'which shew nothing in the nature of surprise, fraud, or con"'spiracy, and which also state nothing to show that the infor"'mation alleged could not with reasonable diligence have been "'obtained at the first trial. The real ground that influenced "'the learned judge appears to have been that he came to his "'former conclusion of fact with hesitation, and that the matter "'is serious for the defendant in consequence of his position. "'Neither of these grounds is in my opinion sufficient.'" Later Lord Loreburn said[7]: "But it is said we have no jurisdiction "upon the ground that under the County Courts Act a county "court judge is entitled to grant a new trial 'if he shall think "'just.' Those words do not give him an arbitrary discretion. "'If he shall think just' means if he shall think just according "to law. The rules to which I have referred are the law which "he, like other judges, is bound to obey."

Finally, under this head one asks oneself the question: if there is a wider discretion conferred by this subsection, what are the limits to it? Once one gets away from the principles upon which the High Court will act, where is the limit? Can it be said that a county court judge (and if there are no limits to the discretion it could be said) has power to receive evidence on affidavit as to what took place in the arbitration, not to show misconduct on the part of the arbitrator—that could always be done

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[5] [1910] A.C. 373, 374.

[6] Ibid. 375.

[7] Ibid.

—but to show what was not patent on the face of the award, namely, that he had erred in law? It seems to me that if one was to treat the discretion at its widest in that sense, it would be in a sense revolutionary, certainly revolutionary in 1846.

For those reasons I am satisfied that the county court judge in exercising his discretion under subsection (3) of section 89 must follow the same principles as those upon which the High Court acts in regard to setting aside awards. Accordingly, it becomes unnecessary to consider Mr. Davies' second contention, which is the alternative one, that even if there were this wide discretion, it was wrongly exercised.

I would like to add this. As I have already said, it would appear that the county court judge under this subsection has no power to remit; he certainly is not given express power to remit, and, as I have already said, it is probable that until 1854 the High Court possessed no inherent power, either generally or as ancillary to a power to set aside, to remit. Indeed, the industry of counsel in this case has failed to find any such case. That power was, as I have said, first given to the court in the Common Law Procedure Act of 1854, and is now to be found in section 22 of the Arbitration Act of 1950, but the reference to "court" in the Arbitration Act of 1950 is a reference to the High Court only unless the context otherwise requires, and while the reference to "any court" in section 4 of the Act dealing with the stay of proceedings has been held to include the county court, I do not see how it is legitimate to construe "court" in section 22 as otherwise than the High Court itself. I cannot help thinking that it is an unfortunate omission in subsection (3) of section 89 that there is no express power to remit. I think the present case shows this up very clearly in that I cannot help thinking that if the power had existed, the judge would have welcomed the exercise of it and remitted this case to the arbitrator. It may be that it would be possible to obtain, as it were, a power to remit by making it a condition of the terms of reference under subsection (3) of section 89, but in one way or another I think that a power to remit is really essential for the proper working of this section.

For the reasons I have endeavoured to state, I would allow this appeal.

Pearce L.J. I agree with all that my Lord has said.

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JENKINS L.J. I entirely agree, and although we are differing from the judge, I cannot usefully add anything to the reasons given by Parker L.J.

Appeal allowed.

Solicitors: *Franks, Charlesly & Leighton; Herbert Oppenheimer, Nathan & Vandyk.*

F. R. D.

AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS *v.* SOCIEDAD FINANCIERA DE BIENES RAICES S.A. THE AELLO.

C. A.
1958
June 18, 19, 20, 24, 27.

Lord Goddard C.J., Parker L.J. and Lloyd-Jacob J.

[1955 A. No. 1170.]

Shipping—Charterparty—Arrived ship—Ship awaiting cargo of maize compelled to wait in Buenos Aires Roads—Ships excluded from dock area unless cargo immediately available—Commercial area of port—Relevance of type of cargo—Roads not place where ships waiting delivery of grain usually lay—Whether roads within commercial area of port.

Shipping—Charterparty—Cargo, obligation of charterer to provide—Ship unable to become an arrived ship unless cargo immediately available—Charterers' failure to have cargo available—Liability of charterers for breach of contract—Whether charterers' breach matter of counterclaim or of defence.

By a port charterparty dated August 27, 1954, the steamship *Aello* was chartered to proceed as ordered by charterers to receive from them a cargo of wheat and/or maize and/or rye "at one or "two safe loading ports or places in the River Parana . . . and the "balance of the cargo in the port of Buenos Aires." The charterers had contracted with a Swiss firm to buy maize f.o.b. Argentine ports at sellers' option in accordance with an allocation received from a body called the Grain Board, and the Swiss firm in turn contracted to buy the maize from an Argentine State concern which controlled the sale and export of maize.

At the date of the charterparty the system of traffic control operated in the port of Buenos Aires did not permit vessels arriving to load maize to proceed beyond a point in the roads called the Intersection—some 22 miles (three hours' steaming time) from the dock area—until they had obtained a "giro" or permit, which was issued by the customs authority on the ship's application only when the shipper had obtained from the Grain Board a certificate to the effect that a cargo had been allocated. Once the giro had been obtained, the ship could proceed to the dock area, where vessels due to load grain usually lay, and wait there until a loading berth became available. At the relevant time supplies of maize were coming down to the port so slowly that by August, 1954, there was a congestion of vessels arriving to load maize. On September 1, 1954, to meet the temporary emergency, the port authority changed the previous system of traffic control by passing a resolution that before a giro could be issued, not only must the Grain Board's certificate be obtained, but also a cargo ready to be loaded must be available.

The *Aello* arrived at the Intersection on October 12, ready to proceed into the dock area; the shippers obtained the Grain Board's certificate on October 13; there was then no congestion in the dock area; but the charterers did not have a cargo of maize ready to be loaded until October 29. Accordingly, as a giro could not, under the terms of the resolution of September 1, be issued, the ship was compelled to wait at the Intersection until October 29.

Though various operations were normally performed at the Intersection, loading of grain at that point was quite impracticable and was never done.

The charterers, contending that the *Aello* was not an arrived ship until October 29, claimed, inter alia, the return of demurrage paid by them to the shipowners under protest. The shipowners by way of defence, or alternatively, by way of counterclaim for damages for breach of contract, contended that if the *Aello* was not an arrived ship on October 12, that was due to the charterers' breach of their absolute obligation to provide a cargo in time:—

Held, (1) that the *Aello* was not an arrived ship until October 29, for when she was at the Intersection she was not within the commercial area of the port, namely, that part of the port where a ship could be loaded when a berth was available; nor did the resolution of September 1 have the effect of extending the commercial area to embrace the Intersection.

Leonis Steamship Co. Ltd. v. *Rank Ltd.* [1908] 1 K.B. 499; 24 T.L.R. 128 applied.

(2) That where the provision of a cargo was necessary to enable the ship to perform its obligation of becoming an arrived ship, the charterers were under an absolute obligation to provide a cargo, or a reasonable part of it, in time to enable the ship to perform its obligation under the contract; and the charterers were not relieved of that obligation by showing that they had before October 29 taken all reasonable steps to provide a cargo.

Ardan Steamship Co. Ltd. v. *Andrew Weir & Co.* [1905] A.C. 501; 21 T.L.R. 723 applied.

(3) That the charterers were not in breach of contract by failing to exercise the options as to choice of cargo or loading port, for the contract gave them an absolute right to choose which option to exercise, regardless of its effect on the shipowners.

(4) That the charterers could not rely on the principle that where both parties contracted with knowledge of local conditions at a particular port, the charterers' obligation to provide a cargo did not arise until the ship's turn to load arrived, for at the date of

this charterparty the shipowners had no knowledge of the conditions at Buenos Aires.

Jones Ltd. v. *Green & Co.* [1904] 2 K.B. 275 distinguished.

(5) That as the ship had never fulfilled its primary obligation to arrive geographically it could not be deemed to have been an arrived ship on October 12. The charterers' breach was a matter for counterclaim only.

Mackay v. *Dick* (1881) 6 App.Cas. 251 distinguished.

Decision of Ashworth J. [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626 affirmed.

APPEAL AND CROSS-APPEAL from Ashworth J.[1]

The following facts are taken from the judgment of Parker L.J. and written admissions by the parties: The plaintiffs (charterers) are an Hungarian State trading concern responsible for the purchase of grain. On June 23, 1954, they contracted with Bunge Aktiengesellschaft of Zürich for the purchase of Plate maize f.o.b. Argentine ports at sellers' option, and in accordance with the allocation as received from a body known as the Direccion Nacional de Granos y Elevadores, Buenos Aires, hereinafter called the Grain Board. The plaintiffs under the contract were to supply tonnage.

On August 5, 1954, Bunges, through Bunge & Born Limitada, in turn contracted to buy the maize from the Institudo Argentine de Promocion del Intercambio, a State concern having the monopoly of purchase from farmers and of sale for export, hereinafter called "I.A.P.I." The purchase was f.o.b. ports of the rivers not above San Lorenzo, completing in the port of Buenos Aires.

On August 27 the plaintiffs entered into a charterparty on the Centrocon form for the charter of the *Aello* to carry the maize so purchased to Hamburg.

So far as is material the charterparty provided as follows: By clause 2 the ship was to proceed as ordered by the charterers to the under-mentioned ports or places and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bulk, which cargo the charterers bound themselves to ship. Clause 3 provided that the ship should load at one or two safe loading ports or places in the River Parana not higher than San Lorenzo, and the balance of the cargo in the port of Buenos Aires or Eva Peron (now renamed La Plata) or Montevideo at charterer's option. Clause 13 provided for payment of demurrage and clause 16 provided for despatch money. Clause 30 was an exception clause, but it was immaterial to the facts of the case. The charterparty also contained an arbitration clause.

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[1] [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626.

In due course the *Aello* went to Rosario and there loaded a part cargo. On October 11 she was ordered to Buenos Aires to complete loading, and at 1.30 p.m. on October 12 she arrived at what was called the Intersection in Buenos Aires roads which was about 22 miles (three hours' steaming time) from the dock area of the port of Buenos Aires. She had obtained free pratique and, so far as she was concerned, she was ready, when so permitted by the port authorities, to move up to the dock area and to a loading berth. In fact no permission was forthcoming, and she remained in the roads until October 29, 1954, when for the first time she was allowed to proceed to the dock area and to a berth where she arrived at 2 p.m. on October 29, 1954. Loading, partly from lighters and partly from the elevator, was completed on November 6, when she sailed for Hamburg.

As a result of questions by the court during the hearing of the appeal, certain cabled information was received from Buenos Aires and was admitted by the court as additional evidence, with the effect that the admissions made by the parties before Ashworth J.[2] were amended to read as follows: " (1) The plaintiffs " did not have available at Buenos Aires any completion cargo " for the *Aello* before October 29, 1954. (2) Bunge y Born Ltda. " as shippers procured the issue on October 13, 1954, of a certi- " ficate of the Junta Nacional de Granos of which the following " is a translation: 'I certify that the National Grain Board will " ' load 3,500 tons maize 53/54 through Messrs. Bunge y Born " ' on the s.s. *Aello* which must berth alongside. Elevator " ' Manager. October 13, 1954.' (3) At all material times (i) it " was not possible for the plaintiffs, Bunge y Born Ltda., or " (to the extent that they were concerned) Agencia Maritima " Sudocean S.R.L., to have had available at Buenos Aires a " completion cargo of any description, or the certificate of the " Junta Nacional de Granos, or a ' giro ' before these were in fact " procured by them; (ii) the plaintiffs, Bunge y Born Ltda., and " (to the extent that they were concerned) Agencia Maritima " Sudocean S.R.L., acted reasonably in every step which they " took to procure a completion cargo, the issue of a certificate " of the Junta Nacional de Granos and of a ' giro '; (iii) there " was nothing which the plaintiffs, Bunge y Born Ltda., or (to

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[2] [1957] 1 W.L.R. 1228, 1230–1233.

"the extent that they were concerned) Agencia Maritima Sudocean S.R.L., could have done which would have resulted in "the procurement of a completion cargo, or in a certificate of the "Junta Nacional de Granos or a 'giro' being issued before they "were in fact procured or issued. (4) Bunge y Born Ltda. and "Agencia Maritima Sudocean S.R.L. (*a*) at all material times "knew the following facts: (i) no 'giro' could be obtained for "the vessel unless and until a certificate had been issued by the "Junta Nacional de Granos certifying that the latter body had "allotted a parcel of grain (whether maize wheat or rye) for "loading on the vessel; (ii) such a certificate could only be "obtained by or on behalf of Bunge y Born Ltda., who were the "purchasers of the intended completion cargo from I.A.P.I. and "the proposed shippers and exporters thereof; and (*b*) at all "material times on and after September 1, 1954, knew that no "'giro' entitling s.s. *Aello* to go to a berth in the inner harbour "of Buenos Aires would be granted unless and until a cargo was "available for her. (5) The *Aello* was granted a 'giro' entitling "her to go to a berth in the inner harbour of Buenos Aires on "October 29, 1954, as soon as cargo was available for her and "would at all material times on and after October 13, 1954, have "been granted such a 'giro' immediately on cargo being available for her. (6) The plaintiffs personally had no knowledge "of the system in force in relation to applications for certificates "of the Junta and 'giros' and accordingly did not know that "no 'giro' could be obtained until the certificate of the Junta "Nacional de Granos had been issued, nor did they know who "could apply for such a certificate, nor did they know that no "'giro' entitling the *Aello* to go to a berth in the inner harbour "would be granted to the *Aello* unless and until cargo was "available for her."

On the basis of those admissions and the affidavit evidence, the reasons for the delay between October 12 and October 29, as stated by Parker L.J., were as follows: In the normal way a ship could not proceed beyond the Intersection without a permit, known as a giro, which was issued by the customs authority on the application of the ship. In the ordinary way that giro would be issued as soon as the shipper had obtained a certificate from the Grain Board to the effect that a cargo was available. Once the giro had been issued the ship would proceed to the dock area or inner harbour and there wait until a loading berth was available. It appeared, however, that in 1954 maize was very slow in coming down to the port, and as a result there was a congestion of vessels arriving to load maize. In those circumstances the port authority on September 1, 1954, resolved that no giro should be issued to enable a ship arriving to load maize to proceed beyond the Intersection until not only such a certificate had been obtained but also the cargo was ready to be loaded. That resolution of the port authority, which was designed to meet a temporary emergency, remained in force until the middle of December, 1954.

From the admissions it was clear that though the shippers obtained the necessary certificate from the Grain Board on October 13, a cargo of maize was not ready to be loaded until October 29, 1954, so that a giro could not under the resolution be issued until that date.

Further relevant facts were that: (1) at all material times the Intersection was a place where a ship would be examined by the sanitary authorities and by the customs officers; (2) inflammable materials and explosives exceeding 25 tons in amount had to be discharged there before a ship could proceed to the dock area; (3) in addition, discharge of cargo took place at the Intersection where necessary to lighten the ship before she proceeded up river; (4) loading of grain at the Intersection would be quite impracticable and was never done.

If the ship was an arrived ship at 1.30 p.m. on October 12, lay days would have expired by 1 p.m. on October 28, and in that event demurrage in the sum of £1,887 10s. had become due. If, on the other hand, she was not an arrived ship until October 29, no demurrage was due, but the charterers would in that event have earned despatch money in the sum of £864 4s. 8d. In fact the shipowners demanded the former sum by way of demurrage before the ship sailed, and on November 15, 1954, the charterers under protest, and on the shipowners' undertaking to repay any part thereof which might thereafter be found not to have been due, paid them the sum of £1,887 10s. in order to get delivery of the bills of lading. On May 5, 1955, the charterers issued a writ in the present proceedings, claiming the two sums by way of demurrage and despatch money, and alleging that the *Aello* was not an arrived ship at the port of Buenos Aires until 2 p.m. on October 29, 1954.

The shipowners contended that the *Aello* became an arrived ship at Buenos Aires at 1.30 p.m. on October 12, 1954, and that demurrage was therefore due; they further contended that if the vessel was not an arrived ship at 1.30 p.m. on October 12, 1954, she would have become an arrived ship by 4.30 p.m. on that date, by which time she would have reached a berth in the inner harbour but for the charterers' breaches of the charterparty; that if and to the extent that they were held liable to charterers, such liability arose from the charterers' breaches of the charterparty; and they counterclaimed to recover the amount of such liability, or, alternatively, that amount less £25 (representing demurrage at the charterparty rate for a period of three hours, the time required for the vessel to proceed from the roads to a berth in the inner harbour) as damages for the breaches.

On November 18, 1957, Ashworth J. gave judgment for the charterers on their claim, holding that as the Intersection, though within the legal fiscal and administrative limits of the port of Buenos Aires, was not within the commercial area of the port for a ship waiting to load maize, and, further, that as the ship was not ready physically because she had no giro enabling her to berth at some place in the dock area, the ship was not an arrived ship until October 29. He awarded the charterers the sum of £2,751 14s. 8d. on their claim. On the shipowners' counterclaim, the judge gave judgment for them on the ground that the charterers were under an absolute duty to have a reasonable amount of cargo available to enable the ship to receive it in ordinary course; and he awarded them £2,726 14s. 8d. By agreement between the parties no order was made as to costs, the court being told that the case had been chosen as a test case affecting some 30 or 40 other ships which had been similarly delayed. The shipowners appealed. The charterers cross-appealed.

A. A. Mocatta Q.C. and *R. A. MacCrindle* for the shipowners. First, the *Aello* was an arrived ship in law when she anchored at the Intersection on October 12, because she was geographically in the commercial area of the port of Buenos Aires as defined by Kennedy and Buckley L.JJ. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[3] Under a port charterparty a ship is arrived when (*a*) she has reached that area of the named port in which the master can effectively place her at the disposal of the charterer and as near as circumstances permit to the actual loading spot, and (*b*) she is in a place where ships waiting for access to that spot usually lie; the spot where the ship is need not be the spot at which it is possible to load or discharge. Further, the question whether the ship has arrived and is in the commercial area must be looked at as at the date when she arrives. The commercial area of the port of Buenos Aires has always included the free anchorage. Up to September 1, 1954, a ship had to get as near to the loading spot as she could, and unless the inner harbour was full she had to get into it before the test of Kennedy L.J.[3] could be satisfied. After September 1 the free anchorage came into use not only when the inner harbour was full but also for every ship arriving to load maize; thus the Intersection became the nearest spot to which a maize ship could get until the charterer had performed his part of the duty and obtained the giro. An application of the law to those facts produces the result that when the *Aello* on October 12 reached the Intersection—a place where maize ships usually lay after September 1—she was an arrived ship.

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[3] [1908] 1 K.B. 499, 521–522, 512–513; 24 T.L.R. 128.

[LORD GODDARD C.J. It is difficult to see how a ship 22 miles —three hours' steaming time—from the dock area can be said to be in the commercial area. Though distance by itself may not be the test, it may be an important factor.]

[PARKER L.J. It is difficult to accept that a new practice introduced to meet a short emergency could have the effect of enlarging by 22 miles a commercial area which had been established for many years.]

The definitions in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[3] were approved by Scrutton L.J. in *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[4]; *Van Nievelt Goudrian & Co. Stoomvaart Maatschappij* v. *C. A. Forslind & Son Ltd.*[5]; *per* Atkin L.J. in *Hudson's Bay Co.* v. *Domingo Mumbru Sociedad Anonima*[6]; obiter in *Lewis* v. *Louis Dreyfus & Co.*[7]; and in general terms by the House of Lords in *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[8] The decision of Sellers J. in *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.*[9] on when a ship was "arrived" is distinguishable because of the peculiar proviso in that case. Compare also the changing statements on "commercial area" in Scrutton on Charterparties, 11th ed., pp. 135–139; 16th ed., p. 141.

Secondly, the ship was an arrived ship in law on October 12 because she herself was physically ready to load, and none the less so because she herself still had a formality to perform at the actual loading berth—the obtaining of the police permit, which would take only a few moments. That point is disputed by the charterers.

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[3] [1908] 1 K.B. 499.

[4] [1917] 2 K.B. 204, 212–213.

[5] (1925) 30 Com.Cas. 263, 267–268; 41 T.L.R. 481.

[6] (1922) 10 Ll.L.Rep. 476, 479.

[7] (1926) 31 Com.Cas. 239, 249.

[8] [1926] A.C. 545, 551; 42 T.L.R. 556.

[9] [1957] 1 Q.B. 109; [1956] 3 All E.R. 383.

Thirdly, the ship was also on that date, as Ashworth J. held, in the legal, fiscal and administrative limits of the port of Buenos Aires.

Fourthly, and contrary to the judge's holding, the *Aello* was not prevented from being an arrived ship by the absence of a giro, and for three reasons: (i) its absence meant only that no loading berth was available, and under a port charterparty that is irrelevant in deciding whether she is an arrived ship; (ii) its absence did not affect the ship's readiness, for it could only be obtained when the charterers' agents had obtained the grain certificate; (iii) the charterers cannot be heard to complain because obtaining the giro was dependent on a prior act by them over which the ship had no control. Therefore, applying the principle laid down in *Mackay* v. *Dick*,[10] the ship must be deemed to have arrived, just as in *Mackay* v. *Dick*[10] Lord Blackburn and Lord Watson[11] held that if the buyer prevented the seller from fulfilling the condition the contract was to be taken as satisfied. The charterers here were under a duty to have at least some of the cargo available so that the giro could be obtained. The judge should have applied the principle in *Mackay* v. *Dick*[11] on the giro point and given judgment for the shipowners as a matter of defence to the charterers' claim, so that they could recover demurrage eo nomine. There is between the speeches of Lord Blackburn and Lord Watson[11] no such dichotomy as Devlin J. in *Mona Oil Equipment and Supply Co. Ltd.* v. *Rhodesia Railways Ltd.*[12] found. In *Colley* v. *Overseas Exporters*[13] McCardie J. distinguished *Mackay* v. *Dick*[14] on the ground that the price could not be recovered until the property had passed, but that distinction does not apply here, for these shipowners can be absolved from the results of the ship not being an arrived ship because they have established the absolute obligation of the charterers to provide the cargo.

[PARKER L.J. The principle in *Mackay* v. *Dick*[14] is based, not on breach of any absolute duty, but on breach of an implied duty which arises when two parties have to concur to do something, for example, to obtain a giro. Ashworth J. decided against the shipowners on the application of the *Mackay* v. *Dick*[14] principle as a matter of defence to the charterers' claim, but gave them damages on their counterclaim because he held that the charterers were in breach of the absolute duty to provide the cargo laid down by the House of Lords in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[15]]

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[10] (1881) 6 App.Cas. 251.

[11] Ibid. 263, 271.

[12] (1949) 83 Ll.L.Rep. 178, 186–187.

[13] [1921] 3 K.B. 302, 308.

[14] 6 App.Cas. 251.

Yes; but in *Mackay* v. *Dick*[16] Lord Blackburn was discussing an implied absolute duty, and the principle and the obligation are the same. The *Aello* ought to have been deemed to have arrived on October 12. The giro here was a parallel to the harbourmaster's permission in *Pyman Bros.* v. *Dreyfus Bros. & Co.*[17]

[THE COURT intimated that they would not dissent from Ashworth J.'s holding that the *Aello* was not an arrived ship at any date before October 29, but that that may have been due to the fault of the charterers.]

Eustace A. Roskill Q.C. and *John Donaldson* for the charterers. This has been selected as a test case raising a number of difficult questions of interest to the shipping community, and the court is asked to decide the points which arise (*a*) on the absence of a police permit, and (*b*) whether the roads at Buenos Aires are, as Ashworth J. held, within the legal area of the port.

[LORD GODDARD C.J. If the court decides that the *Aello* was not an arrived ship, anything said on those points would be obiter. The court must adhere to the well-settled rule that if parties want a decision on points other than those on which the court reaches its decision in a particular case, they must raise them in other cases on their own facts. The court is not prepared to clear up a lot of points for the convenience of the parties.]

Then those two points are kept open in the event of an appeal to the House of Lords. The court is also asked to decide the question of importance to the shipping community, which does arise directly, whether there is any conflict between the reasoning of Kennedy L.J. and Buckley L.J. on the definition of "commercial area" in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[18]

[LORD GODDARD C.J. The court does not think that there is any conflict between those views.]

[PARKER L.J. Both Buckley and Kennedy L.JJ.[18] were discussing the area where discharge takes place, as opposed to the actual spot.]

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[15] [1905] A.C. 501; 21 T.L.R. 723.

[16] 6 App.Cas. 251, 263–264.

[17] (1889) 24 Q.B.D. 152.

[18] [1908] 1 K.B. 499, 521–523, 512–513.

Then it follows that the commercial area is the place of discharge and the place of waiting is not enough; that is the decision sought on this point and it is in favour of the charterers.

On the application of the principle in *Mackay* v. *Dick*[19] to the present case and the shipowners' contention that they can succeed on their defence to the charterers' claim and recover demurrage because the ship is to be deemed to have arrived, Devlin J. was correct in pointing out, as he did in *Mona Oil Equipment and Supply Co. Ltd.* v. *Rhodesia Railways Ltd.*,[20] that there are two distinct propositions in *Mackay* v. *Dick*[21]; the first is that stated by Lord Blackburn,[22] that there is an implied term that in certain circumstances each party will concur with the other to do something; the second, stated by Lord Watson,[23] is that if the breach of the implied term by a defendant prevents a plaintiff from performing a condition binding on him, he is to be taken as having fulfilled that condition, and if the condition is one on which the right to payment depends, the plaintiff may sue for payment of damages. See also Smith's Leading Cases, 13th ed., vol. 2, p. 496, that "in some cases "there is implied an agreement that one party will not volun"tarily do anything to prevent the carrying out of the contract."

The first question is: what is the duty of the charterers? To discover that, the contract must be construed to decide what term is to be implied into it. This is a charterparty under which shipowners on August 27, 1954, agreed in express terms to take the ship to Buenos Aires and that lay days were not to begin until the ship had got into the dock area. Anything else must be a matter of implication or construction as at the date of the contract, and all that can be implied is something necessary to make those obligations work. At that date (*a*) all maize vessels waited for their loading berth in the dock area and not in the roads; (*b*) they received their giros when they were in the roads so that they could sail straight in; and (*c*) there had to be a certificate of *allocation* and not of *readiness* of cargo. The latter obligation arose only on September 1 under the resolution. It follows that the only permissible implications before September 1 were that the charterers would (1) apply for the allocation certificate, that is, that they would "concur" within Lord Blackburn's proposition, and (2) do nothing to prevent the ship obtaining a giro, that is, "no prevention" within Lord Watson's proposition.

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[19] 6 App.Cas. 251.

[20] 83 Ll.L.Rep. 178, 186–187.

[21] 6 App.Cas. 251.

[22] Ibid. 263–264.

[23] Ibid. 271.

That is all that can be implied under the two branches of the principle in *Mackay* v. *Dick*.[24]

But on September 1 the Argentine authorities imposed the change of traffic control. The question then becomes: can there be implied into a contract made on August 27 an absolute and unconditional guarantee by the charterers that, no matter what change there may be in traffic control between August 27 and arrival in the roads on October 12, they would obtain and do everything, whatever its nature, which would enable the ship to go straight into the dock when she arrived in the roads? Such a proposition is wholly inapplicable, for it would require the court to rewrite the charterparty and imply into it a guarantee that the Argentine Government would never change its method of traffic control; it would make charterers the insurers of the traffic control arrangements as they were on August 27. Such a term cannot be implied. Unless the shipowners can show that the charterers broke an implied term by failing to concur in doing everything necessary to get the giro (which by admission the charterers did), the shipowners cannot rely on *Mackay* v. *Dick* [24] as a defence to the present claim entitling them to demurrage eo nomine.

Mocatta on the counterclaim. Assuming that the *Aello* was not an arrived ship, the shipowners must succeed on the counterclaim, for the ship was prevented from being an arrived ship by reason of the charterers' breach of their absolute duty to have sufficient cargo ready to enable the ship to get a berth on arrival in the roads. That is the effect of the decision in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[25] which is conclusive on this point. If the absence of the cargo is the sole cause of the ship's failure to be arrived, the charterers are in breach of contract and liable in damages unless an exception clause protects them. It is not enough for them to have done what was reasonable, and it does not matter what the cause might be which prevented them from loading within the lay time: see *Postlethwaite* v. *Freeland* [26] on the absolute nature of the obligation.

The time at which the obligation arises, whether in a berth or a port charterparty, is that time when its performance is necessary to enable the ship to perform its obligation to arrive. Though *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[27] was criticized by Scrutton L.J. in *Einar Bugge A/S* v. *W. H.*

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[24] 6 App.Cas. 251.

[25] [1905] A.C. 501.

[26] (1880) 5 App.Cas. 599, 619.

[27] [1905] A.C. 501.

Bowater Ltd.,[28] that criticism was obiter. Though in *Vergottis* v. *William Cory & Son Ltd.*[29] Greer J. held that it was sufficient for charterers to have done what was reasonable, the observations of the Privy Council on the *Vergottis* case [29] in *Hogarth* v. *Cory Bros. & Co. Ltd.*[30] reconcile that decision with the House of Lords' decision in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[31] and it cannot be relied on by the charterers on the counterclaim.

Lilly & Co. v. *D. M. Stevenson & Co.*[32]—a Scottish decision—is relied on as showing that where the ship could not get into a berth because of the charterers' failure to provide sufficient cargo, she was deemed to have been berthed and her owners could recover demurrage eo nomine as distinct from damages. *Little* v. *Stevenson & Co.*[33] is distinguishable, for there the charterers won only because of the special circumstance that under a berth charterparty a berth became available unexpectedly. *Krog & Co.* v. *Burns & Lindemann* [34] is also relied on (*a*) as explaining *Little* v. *Stevenson & Co.*,[35] and (*b*) as being a case where demurrage eo nomine was recovered by shipowners. [*Barque Quilpué Ltd.* v. *Brown* [36] was also referred to.]

Jones Ltd. v. *Green & Co.*[37] is distinguishable on its special facts, for there both parties had common knowledge of the conditions at the particular port at the date of the contract, and the judgments in favour of the charterers were based on that special knowledge. In the present case the shipowners knew nothing about the conditions at Buenos Aires when the contract was made, and did not even know that they were going there until October 11, when the charterers exercised the option under the charter; and in any event those conditions were changed four days after the contract was made. In Scrutton on Charterparties, 16th ed., p. 152, it is stated that *Jones Ltd.* v. *Green & Co.*[37] must be regarded as overruled by *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[38]: see also Carver's Carriage of Goods by Sea, 10th ed., p. 431, distinguishing those two cases.

Further, the charterers were given, under the contract made on August 27, a large number of options both as to the nature of the cargo and the choice of port; if they chose to opt for maize at the port of Buenos Aires, their absolute duty was to provide that cargo in time, and they are liable for their failure to do so.

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[28] (1925) 31 Com.Cas. 1, 9.
[29] [1926] 2 K.B. 344.
[30] (1926) 32 Com.Cas. 174, 181–182.
[31] [1905] A.C. 501.
[32] (1895) 22 Rettie 278.
[33] [1896] A.C. 108.
[34] (1903) 5 Fraser 1189.
[35] [1896] A.C. 108.
[36] [1904] 2 K.B. 264.
[37] [1904] 2 K.B. 275.
[38] [1905] A.C. 501.

Roskill in reply on the counterclaim. The non-provision of the cargo is a matter for counterclaim only, and accordingly, if this court is bound by the decision of the House of Lords in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[39] to hold that there is an absolute obligation on the charterers to provide the cargo in these circumstances, the shipowners' only remedy must be damages: compare McCardie J.'s decision in *Colley* v. *Overseas Exporters*[40] that the sellers' remedy for failure of buyers to provide a ship was an action for damages.

But *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[41] does not apply here and is distinguishable. The doctrine there laid down has never been applied to a port charterparty, and in no case has it ever been held that the charterers' duty to have a cargo available arises before the ship has got to port. The obligation here was to provide a cargo which could be loaded within the lay time. The absolute duty to have the cargo available arises only after the ship is an arrived ship in the sense laid down in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[42] [*McCarrick* v. *Liverpool Corporation*, *per* Lord Uthwatt,[43] *Panamena Europea Navigacion* (*Compania Limitada*) v. *Frederick Leyland & Co. Ltd.* (*J. Russell & Co.*),[44] and Bullen & Leake's Pleadings, on pleading a condition precedent, 3rd ed., p. 147, note, were also referred to.]

It is conceded that the charterers here took every reasonable step to see that the ship would arrive. *Vergottis* v. *William Cory & Son*,[45] in which Greer J. distinguished *Ardan's* case,[46] should be followed in preference to *Ardan's* case,[46] which has, in any event, been much criticized: in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[47] Scrutton L.J. said that he did not understand it, and in *Einar Bugge A/S* v. *W. H. Bowater Ltd.*[48] he said that he preferred to follow *Jones Ltd.* v. *Green & Son*,[49] which is strongly relied on. *Little* v. *Stevenson & Co.*[50] supports the present submission, for there the absolute nature of the obligation was denied and Lord Herschell L.C.[51] said that it was enough that the charterers had done all that was reasonably necessary. *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[52] is distinguishable also on its facts, for the charterers here had no control over the supply of cargo or the berth, and the charterparty was not a contract obliging them to supply a cargo before the ship arrived.

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[39] [1905] A.C. 501.

[40] [1921] 3 K.B. 302, 308.

[41] [1905] A.C. 501.

[42] [1908] 1 K.B. 499, 512–513, 521–522.

[43] [1947] A.C. 219, 231; 62 T.L.R. 730; [1946] 2 All E.R. 646.

[44] [1947] A.C. 428.

[45] [1926] 2 K.B. 344.

[46] [1905] A.C. 501.

[47] [1917] 2 K.B. 193.

[48] 31 Com.Cas. 1, 9.

[49] [1904] 2 K.B. 275.

[50] [1896] A.C. 108.

[51] Ibid. 119.

[PARKER L.J. Was this within Lord Davey's statement of the law as "a contingency" which was "not contemplated" by either of the parties to the contract? [53]]

Ashworth J. held that there was no fortuitous circumstance here which excused the charterers from performance of their otherwise absolute obligation. But one cannot imply an obligation which will vary according to changes in circumstances over which the charterer has no control.

The cases cited for the shipowners on the application of the principle in *Mackay* v. *Dick* [54] were cases where it did not matter in terms of money whether the claim of shipowners was for liquidated or unliquidated damages. But in the present case, where the court has to decide what is right in principle, it is submitted that, even if the ship failed to be an arrived ship because of some breach by the charterers, the shipowners can only succeed by way of counterclaim. The only cases in which a plaintiff has been put in the same position as he would have been if the condition precedent had been fulfilled are those where he was suing for a sum of money. In no case has the court ever said that it will notionally move a ship from one geographical place to another and give her the same legal rights, but only that the court will put the plaintiff in the same position financially as he would be if the ship had become an arrived ship.

On the charterers' exercise of their options, it is submitted, first, that the options are theirs as of right and when exercised have the effect of making the contract of affreightment operate as if the option as to cargo and port chosen were written into the charter: see Scrutton on Charterparties, 16th ed., p. 139, and *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel Bros. & Co.*[55] Secondly, the necessary implications have still to be made under the contract of August 27, which contains the option to send to Buenos Aires. It is not necessary, in order to make this contract work, to imply that, if the option is exercised and traffic control changes between the dates, the loss must fall on the charterers.

[52] [1905] A.C. 501.

[53] Ibid. 512.

[54] 6 App.Cas. 251.

[55] [1891] 2 Q.B. 647.

[*Harrowing* v. *Dupre* [56] was also referred to.] The appeal should be dismissed and the cross-appeal allowed.

Cur. adv. vult.

June 27. LORD GODDARD C.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. read the following judgment in which he said that though the net result of the judgment of Ashworth J. was a balance of only £25 in favour of the charterers, the court had been told that this was a test case arising out of the congestion of ships arriving to load maize at Buenos Aires in the period September–December, 1954. His Lordship continued: Though a number of points have been taken, the two main issues which fall to be determined are:

(1) Whether the defendants' ship the *Aello* became an arrived ship when she anchored in the roads at Buenos Aires on October 12, 1954; and this depends on the application to the facts of the case of the principle laid down in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[1]

(2) Whether, if the *Aello* was not then an arrived ship, the plaintiffs were themselves in breach of any duty which prevented her from being an arrived ship at any time before October 29, 1954.

[His Lordship stated the facts set out above, said that it was clear from the terms of the charterparty that this was a port and not a berth charterparty, and that, despite the arbitration clause, the parties had agreed to waive arbitration in order to get the legal points decided by the courts without delay. He continued:]

As regards the law applicable, the position prior to 1908 in regard to a port charterparty was in some confusion. In that year *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[2] came before this court. Kennedy L.J., in what has often been regarded as the leading judgment on the question, held that under such a charterparty a ship became an arrived ship when she was ready and at the freighters' disposal within the named port in its commercial sense, that is, within the commercial area of the port. He set out what he meant by the commercial area as follows[3]: "In the absence "of any proof of a custom of this kind—and I may note in passing "that no evidence of such a custom was given in the present

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[56] (1902) 7 Com.Cas. 157.

[1] [1908] 1 K.B. 499; 24 T.L.R.

[2] [1908] 1 K.B. 499.

[3] Ibid. 521–522.

"case—the commercial area of a port, arrival within which makes "the ship an arrived ship, and, as such, entitled to give notice of "readiness to load, and at the expiration of the notice to begin to "count lay days, ought, I think, to be that area of the named "port of destination on arrival within which the master can "effectively place his ship at the disposal of the charterer, the "vessel herself being then, so far as she is concerned, ready to "load, and as near as circumstances permit to the actual loading "'spot' (I use the convenient word which was employed by "Denman J. in *Tapscott* v. *Balfour*,[4] and by Bramwell L.J. in "*Davies* v. *McVeagh*[5]), be it quay or wharf, or pier, or mooring, "and in a place where ships waiting for access to that spot "usually lie, or, if there be more such loading spots than one, as "near as circumstances permit to that one of such spots which "the charterer prefers."

Applying that test to the facts of the present case it is claimed that all the conditions were fulfilled. Reading the test literally, that may be true, but there is a real danger of interpreting words of a judgment as if they were in a statute and without regard to the facts of the case. In the *Leonis* v. *Rank* case[6] the ship in question was not 22 miles away from the dock area; she was anchored but a few ships' lengths off the pier alongside which loading took place. I agree, of course, that distance is not a conclusive factor, but what Kennedy L.J. was, I think, contrasting throughout his judgment was an area where loading takes place as opposed to the actual loading spot. The commercial area was intended to be that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available.

Buckley L.J.'s judgment[7] is, I think, to the same effect. He contrasts a "berth," meaning thereby a berth, wharf or quay or place where by the use of lighters or other means a vessel can load or discharge, with the expression "place of discharge" as meaning a place of larger area than a "berth" within which area there are a "berth" or "berths." The "place of discharge" there referred to is, I think, the same as the commercial area referred to by Kennedy L.J. I cannot think, as has been suggested in the present case, that there is any conflict between the two judgments; and it is to be observed that Lord Alverstone C.J. agreed with both.

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[4] (1872) L.R. 8 C.P. 46.

[5] (1879) 4 Ex.D. 265.

[6] [1908] 1 K.B. 499.

[7] Ibid. 512–513.

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Further, if the argument on behalf of the shipowners is correct, it would have been sufficient in the *Leonis* case [8] to define the commercial area as that area within the fiscal, legal and administrative limits of the port which embraced any place beyond which ships could not proceed without some steps being taken by the shipper. For my part, I am satisfied that the Intersection was not within the commercial area of the port before the resolution of September 1, 1954. The giro was merely the traffic signal which enabled the ship to proceed into the commercial area, namely, the dock area or inner harbour. Nor, like the judge, do I think that it is possible to say that that resolution had the effect of extending the commercial area to embrace the Intersection. The giro remained a traffic signal as before.

Accordingly, the judge was, in my judgment, right in holding that the *Aello* was not an arrived ship until October 29, 1954.

In the premises it becomes unnecessary to consider whether, as the charterers contend, the Intersection is not even within the fiscal, legal and administrative limits of the port, nor whether the absence of a police permit or of the giro itself prevented the ship from otherwise being an arrived ship.

I turn now to the second main issue which arises on the basis that the *Aello* was not an arrived ship on October 12. There is undoubtedly an absolute obligation on a shipper to provide a cargo (compare *Postlethwaite* v. *Freeland*,[9] *per* Lord Blackburn [10]); and the real question is as to the point of time when that obligation has to be fulfilled. I confess that, apart from authority binding on this court, I should have thought that this obligation only had to be fulfilled as and when the ship had fulfilled its obligation of becoming an arrived ship and then only to the extent which would enable the shipper to load within the lay days or within a reasonable time if no lay days were fixed. Prior to the ship becoming an arrived ship the shipper might well be under an implied duty to concur in doing what is necessary to enable the ship to arrive or not to prevent the ship from arriving: compare *Mackay* v. *Dick*.[11] That duty, however, would be fulfilled by taking reasonable steps to that end. I would adopt the words of Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[12]: "In my "judgment the obligation to provide the cargo would be fulfilled "if the shipper made and carried out arrangements for the "delivery of the cargo at the ship's side in time to load her in

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[8] [1908] 1 K.B. 499.

[9] (1880) 5 App.Cas. 599.

[10] Ibid. 619.

[11] (1881) 6 App.Cas. 251.

[12] [1926] 2 K.B. 344, 354.

"accordance with the terms of the charterparty. Further, it is "difficult to understand how there can be any duty to provide "the cargo before the ship completes her inward journey and "becomes an arrived ship. It seems to me that it must be the "duty of the ship to become an arrived ship before the shippers' "duty to provide the cargo can arise. The promises on the part "of the shipowner to present his vessel in the agreed place, and "on the part of the charterer to there provide her with the agreed "cargo and load it in the agreed time, are mutual interdependent "promises. And until the ship has performed its part by arriving "at the agreed place, the shipowner cannot complain that the "cargo has not been provided." And later he said [13]: "I think "there is an implied term in the charterparty that the defendants would do whatever was reasonable in order to enable the "plaintiff's ship to get into the dock and so become an arrived "ship."

On this view of the law, and on the admissions made by the parties, a cargo was provided by October 29, when the ship arrived in the commercial area, and prior thereto the charterers had taken all reasonable steps to provide a cargo and thus enable the ship to proceed from the Intersection into the commercial area and become an arrived ship. On the other hand, if this view of the law is wrong and there was an absolute obligation on the charterers to have a cargo ready on October 12, then they were in breach, and, since there was no congestion of ships in the inner harbour, that breach prevented the ship from proceeding there and becoming an arrived ship.

The judge, however, felt that he was bound by the decision of the House of Lords in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[14] The charterparty in that case was undoubtedly a berth charterparty. There were no fixed lay days and the obligation to load within a reasonable time commenced from the time the ship was berthed. The ship reached Newcastle on July 14 to load coal from a particular colliery, but, owing to shortage of available cargo from that colliery, she was not allowed to berth until August 13. Even when she did berth, continuous loading was impossible and she had twice to be removed from her berth before the loading was completed. The shipowners sued for and recovered damages for detention for the 31 days before the ship was allowed to berth. The House of Lords held that the absolute obligation to provide a cargo fell to be fulfilled on July 14, so as to enable the ship to get a berth. The charterers in that case

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[13] [1926] 2 K.B. 344, 355.

[14] [1905] A.C. 501; 21 T.L.R. 723.

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strongly relied on *Little* v. *Stevenson & Co.*,[15] in which a berth unexpectedly became vacant but no cargo was available, and Lord Halsbury L.C. had disputed the proposition of law "that a "merchant must be always ready with his cargo at all times "and in all places and under all circumstances to take advantage of any such contingency, if it should arise." In *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[16] Lord Halsbury L.C. explained that while the merchant was not obliged to be ready to meet every contingency however remote, he was obliged to have a cargo ready in the circumstances of that case. Lord Davey put the matter in this way[17]: "I think that what was "there laid down" (that is in *Little* v. *Stevenson & Co.*[18]) "must be read with regard to the facts of that case, and that "all that was meant was that the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready "to receive it in ordinary course, and that he is not bound to "be prepared for a contingency or fortuitous circumstance not "contemplated by either of the parties." And later he said[19]: "But, however the argument is put, I cannot accede to it. It "appears to me that it is only putting the old question in another "way. By whose default was it that the ship did not get a "loading order? The answer, in my opinion, can only be that "it was the default of the respondents in not providing the cargo "when the ship was ready to go on the berth to receive it. It "is said that the respondents did nothing unreasonable. Be it "so. But through their misfortune (it may be) they have failed "to perform their contract with the shipowners. In short, the "respondents have not satisfied my mind that it was any part "of their contract with the appellants that the latter should "await the turn of the colliery or take the risk of the cargo not "being ready."

It is clear from that latter passage that he was treating the obligation as absolute and rejecting any test based on reasonableness.

Now it is true that in that case the ship had undoubtedly got to the commercial area of the port, and was only prevented by the absence of cargo from getting a berth. Further, as Mr. Roskill points out, there is no case in which it has been held that a cargo must be ready to enable a ship to get into the commercial area. However, bearing in mind that the charterparty in *Ardan's*

[15] [1896] A.C. 108, 116.
[16] [1905] A.C. 501, 510.
[17] Ibid. 512.
[18] [1896] A.C. 108.
[19] [1905] A.C. 501, 514.

case [19] was a berth charterparty, I should have thought that the principle was plain, namely, that if the provision of a cargo is necessary to enable the ship to perform its obligation, namely, to become an arrived ship, the absolute obligation of the shipper is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation.

It is true that Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[20] felt that if necessary he might be able to distinguish *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[21] but in fact he decided the case on another point, and it became unnecessary to seek to do so. Further, Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[22] found the decision difficult to understand, and in *Einar Bugge A/S* v. *W. H. Bowater Ltd.*[23] was clearly anxious to confine the decision to its special facts.

However that may be, I can see no valid ground on which *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[24] can be distinguished, and, like Ashworth J., I follow it.

Before leaving this part of the case I should mention two further arguments that were raised, one by Mr. Mocatta and one by Mr. Roskill. Mr. Mocatta, for the shipowners, relied strongly on the fact that the charterers had extensive options under the charterparty. Thus they could have loaded wheat or rye instead of maize and they could have ordered the ship to complete at Montevideo. Yet, with knowledge of the conditions at Buenos Aires after September 1, 1954, they ordered the ship to that port to load maize. Thus, it is said, they prevented the ship from being an arrived ship until October 29. Attractive as this argument may appear at first sight, I am unable to accept it. Having by the contract obtained the right to exercise different options, it seems to me that they can choose which to exercise, regardless of how it may affect the shipowners. Otherwise one would be introducing a qualification into the exercise of what is by the contract an absolute right. Further, as a matter of business, it was not the charterers' option but the option of the sellers.

Mr. Roskill, on behalf of the charterers, strongly relied on such cases as *Jones Ltd.* v. *Green & Co.*,[25] in which it was held that where particular conditions at the port are known to both parties, the charterers' obligation to provide a cargo does not arise until such time as in the light of those conditions the ship's turn to load arises. Such cases were relied on by the charterers

[19] [1905] A.C. 501.
[20] [1926] 2 K.B. 344, 354.
[21] [1905] A.C. 501.
[22] [1917] 2 K.B. 193, 202.
[23] (1925) 31 Com.Cas. 1, 8–9.
[24] [1905] A.C. 501.
[25] [1904] 2 K.B. 275.

in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[26] but it was held that that principle only applied where it was clear that both parties contracted with knowledge of those conditions. Here, for the reasons given by the judge, it is clear that the shipowners at the time the charterparty was entered into had no knowledge of the particular conditions at Buenos Aires.

In these circumstances there only remains the subsidiary question whether, as the judge held, the charterers' breach is a matter of counterclaim or whether, as the shipowners contend, it is a matter of defence.

Based on the decision in *Mackay* v. *Dick* [27] it is said on behalf of the shipowners that the *Aello* must be deemed to have been an arrived ship on October 12, and accordingly that despatch money had not been earned and that the demurrage paid under protest was properly payable. Reference was also made to *Lilly & Co.* v. *D. M. Stevenson & Co.*[28] and *Krog & Co.* v. *Burns & Lindemann*,[29] in which it is pointed out that the shipowners recovered demurrage eo nomine and not unliquidated damages. The question, however, was not argued in those two cases, no doubt because it was merely of academic interest. Indeed the same was true in *Hogarth* v. *Cory Brothers & Co. Ltd.*,[30] a Privy Council case, where Lord Phillimore said [31]: "If a ship is prevented from getting to a loading berth owing to an obstacle "created by the charterer, or owing to the default of the charterer "in performing his duty, then it is well established that the "shipowner has done all that is needful to bring the ship to "the loading place, and that the charterer must pay for the "subsequent delay. Whether the latter's measure of liability "is arrived at by giving to the shipowner damages for the delay, "or whether the lay-days are antedated to the date when they "ought to have begun, and the charterer pays for them at the "agreed rate of demurrage, does not seem to have been determined. But no point as to which of these two measures of "payment should prevail has been made by the parties in this "case."

I think that the breach of the charterers' obligation is a matter of counterclaim and not of defence. The reason, as I understand it, why the plaintiff in *Mackay* v. *Dick* [32] recovered the price and not damages was that the machine had been delivered and the property had passed, subject only to the defendant's right to reject if the machine on a special test failed to come up to a particular standard of performance. The defendant, having prevented the holding of that test, was held to be in the same position as if the condition had been fulfilled. In other words, the price became payable not because the property was deemed to have passed but because the condition was deemed to have been fulfilled. If in such a case as this the ship had arrived, but it was provided that lay days were not to begin until something had been done which depended on the charterers' co-operation, then if the charterers refused or neglected to co-operate, that something might well be deemed to have been done. But here, if I am right, the primary obligation to arrive geographically was never fulfilled; and, that being so, I think the charterers' breach is a matter for counterclaim. Accordingly, I would dismiss the appeals.

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[26] [1905] A.C. 501.
[27] 6 App.Cas. 251.
[28] (1895) 22 Rettie 278.
[29] (1903) 5 Fraser 1189.
[30] (1926) 32 Com.Cas. 174.
[31] Ibid. 178–179.
[32] 6 App.Cas. 251.

LORD GODDARD C.J. I agree with the judgment my Lord has read, and there is nothing that I wish to add.

LLOYD-JACOB J. I agree.

Shipowners' appeal dismissed.
Charterers' cross-appeal dismissed.
Leave to appeal to House of Lords
granted to both parties.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

M. M. H.

END OF VOL. II AND OF Q.B. SERIES FOR 1958.

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